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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 324.

THE VIRGINIAN RAILWAY COMPANY,
Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

System Federation No. 40, the principal respondent herein, is a federation composed of system craft organizations existing among the shop craft employees of the mechanical department of the petitioner, The Virginian Railway Company. This suit was brought by the respondents to compel the Railway to recognize and "treat with" (in the sense of "negotiate with") the Federation as the representative of its mechanical department employees and (among other things) to enjoin it

from attempting to influence or interfere with such employees thereafter in their choice of representatives for the purpose of collective bargaining. The relief requested was granted by the District Court and on appeal its decree was affirmed by the Circuit Court of Appeals. The case is in this Court on certiorari.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 254-279) is reported in 11 F. Supp. 621. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 311-339) is reported in 84 F. (2d) 641.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fourth Circuit (R. 340) was entered on June 18, 1936. The petition for a writ of certiorari was filed August 31, 1936, and was granted October 12, 1936 (R. 342). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

I. Whether Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class (in this case the Federation), imposes a legally enforceable obligation upon the carrier to negotiate with the representative so certified.

II. Whether, if Section 2, Ninth, of the Railway Labor Act requires the Railway to negotiate with the Federa-

tion, it is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

III. Whether the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

IV. Whether the certification of the Mediation Board is a nullity (a) because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, or (b) because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

V. Whether an injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway should have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

VI. Whether Section 9 of the Norris-LaGuardia Act prohibits the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 67-77.

STATEMENT.

The mechanical department employees of the Railway comprise six shop crafts (R. 31, 244). These shop crafts are divided between (1) so-called "back-shop" employees, whose work consists solely of "classified repairs" and "store order work" (with the exception of one man who makes "running repairs" on a switch engine maintained at Princeton, West Virginia, where the back shop is located and all the back-shop employees work) and (2) employees engaged in making "running repairs". "Classified repairs" are heavy repairs made to locomotives and cars, such as rebuilding and putting them in shape for months of service. For the purpose of classified repairs the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. The Railway has had like work on the locomotives done by the Baldwin Locomotive Works, and the Virginia Bridge and Iron Works has rebuilt a great many of its cars. "Store order work" consists of manufacturing material (such as rivets and repair parts) to be placed in stores at different points on the railroad. If the Railway can make these articles more cheaply than it can buy them they are made at its back shop; otherwise they are bought on the market. (R. 177-180). "Running repairs" are repairs to equipment other than classified repairs. Approximately one-third of the mechanical department employees are back-shop employees. (R. 177, 196).

On July 3, 1922, the United States Railroad Labor Board adopted a resolution calling upon the employees of carriers generally to organize into associations to function in the representation of such employees in disputes involving rules, wages and grievances. The Railway

received an official copy of the resolution (R. 133) and gave information in regard to it to its employees by bulletins posted at various places along the road (R. 145). (The record does not disclose the form or contents of these bulletins.) Subsequently the mechanical department employees of the Railway formed such an association (R. 134), which is hereinafter referred to as the Association, and adopted a written constitution effective October 1, 1922 (R. 224). Beyond posting the bulletins aforesaid and assisting in "smoothing out" the constitution framed by the employees, the Railway had nothing to do with the organization of the Association (R. 144, 145, 180). The Association and the Railway then negotiated and executed a contract covering rules, wages and grievances, effective November 15, 1922, and to continue in effect for one year and thereafter until changed as therein provided (R. 244). The contract has not been terminated (R. 142).

The Railway assisted the Association to function by furnishing meeting places (R. 104), transmitting its notices to members through the company mail (R. 104, 112), paying travelling expenses (R. 115) in an amount averaging approximately $100 a year (R. 145) and possibly furnishing printed ballots for the elections (R. 81, 111). It is not contended that the Railway continued any such financial assistance after it became unlawful for it to give it. The Railway did not interfere in any way with the selection of officers of the Association (R. 110, 111, 120, 142, 167) or with its policies (R. 134, 167).

In the fall of 1933 the American Federation of Labor instituted an intensive campaign for membership among the mechanical department employees of the Railway (R. 76-77). While this was going on the Railway posted

bulletins, dated January 20, 1934, at points that had bulletin boards, the substance of which was that the reports being circulated that the law or the Federal Coordinator of Transportation had outlawed company unions (such as the Association) were unfounded (R. 180-181, 195-196). Other railroads issued similar statements (R. 181). These bulletins were identical with the notices which the Eastern Regional Coordination Committee decided to recommend to the Eastern Presidents' Conference for posting for the information of employees (R. 187-189).

In the spring and summer of 1934 the Federation made various attempts to supplant the Association as representative of the mechanical department employees (R. 233, 234, 235, 239). Under date of July 11, 1934, while these attempts were continuing, the Railway distributed to its employees in pamphlet form, a statement (known in the case as the Sasser statement) purporting to be "a plain statement of the facts in connection with the proposed change" from "Company Employee Representation to National Organization Representation". It asked the employees to give due consideration to these facts, adding, however, that the employees were "entirely free to exercise their choice of representatives, free from fear or favor from their employer" (R. 197).

On August 20, 1934, and subsequent days an election was held on the railroad, conducted by a representative of the National Mediation Board, to determine for each of the six shop crafts whether the employees therein, including the back-shop employees, desired representation by the Federation or by the Association (R. 31, 88). Under date of September 13, 1934, the Mediation Board issued a certification reciting the votes by crafts for the two unions and

on the basis thereof certifying that the Federation had "been duly designated and authorized to represent the mechanical department employees of The Virginian Railway Company" (R. 13). The certification does not show the number of eligible voters or otherwise indicate whether or not in any craft the Federation was the choice of the majority or even whether the majority voted in the election. The number of eligible voters was stipulated at the trial. From this stipulation it appears that in two of the crafts, namely the blacksmiths and the carmen and coach cleaners, a majority did not vote for the Federation and in one of them, namely the carmen and coach cleaners, less than a majority voted in the election (R. 196). Furthermore, it is impossible to tell from the certification what the result of the election would have been in any craft without the votes of the back-shop employees.

In the fall of 1934 a union known as the Independent Shop Crafts Association (hereinafter called the Independent) was formed (R. 167-169). It was not organized by the Railway and the Railway did not function with it (R. 148-149).

There is evidence that Nevins, the Railway's master mechanic at Victoria, had a conversation with an employee under him in which he persuaded the employee not to vote for the Federation (R. 108-109), and, after the election, that Forbes, car foreman at Elmore, obtained from several employees petitions repudiating the Federation and that two workmen on the job circulated several applications for membership in the Independent during working hours (R. 116-120, 122-124), one of them saying he thought it would be best to sign up because the Railway was not going to recognize the Federation (R. 117).

At a conference on December 27, 1934, the Federation presented to the Railway for consideration a draft of agreement transferring to the Federation the existing agreement with the Association, with clauses extending its scope to include employees not members of the mechanical department (R. 61, 74, 78). No subsequent conference was held (R. 79).

On May 2, 1935, the respondents instituted suit in the District Court of the United States for the Eastern District of Virginia asking that the Railway be required to recognize and treat with the Federation as the representative of the mechanical department employees and (among other things) be enjoined from attempting to influence or interfere with said employees thereafter in their choice of representatives for the purpose of collective bargaining (R. 2). On May 20, 1935, the Railway filed a motion to dismiss (R. 37) and an answer (R. 39). After hearing, the District Court on July 24, 1935, filed an opinion (R. 254) holding that the Railway should be required to recognize and treat with the Federation as the representative of the five crafts in which a majority of the eligible voters had participated in the election, that is to say, all the crafts except the carmen and coach cleaners, and also should be enjoined from interfering with the respondents and the members of the crafts involved in the matter of self organization.

On August 23, 1935, the District Court entered a final decree (R. 279), overruling the motion to dismiss, making findings of fact and granting relief. The court found (R. 280-281) that the Federation was the duly authorized representative of the Railway's mechanical department employees, except the carmen and coach

cleaners, "having been designated as such" by the certification aforesaid, and that the Railway, in violation of Section 2 of the Railway Labor Act, had failed to treat with it as such. The court further found (R. 281-282) that "by means of personal interviews, posted bulletins and by the circulation of a pamphlet [the Sasser statement] calling the attention of its mechanical department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant [Railway] sought to influence its mechanical department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammelled right to choose their own representative"; that the Railway, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the Mediation Board to have the certification aforesaid altered, changed or revoked, and, by circulating or causing to be circulated applications for membership therein, caused the Independent to be organized, all in violation of the Railway Labor Act; and that it continued and now continues by the means aforesaid to endeavor to deprive its mechanical department employees of any and all right to independent representation, in violation of the Railway Labor Act.

By paragraph 1 of the decree (R. 282) the District Court ordered the Railway to treat with the Federation "so certified as aforesaid, and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes", and by paragraph 2 of the decree (R.

282-283) it enjoined the Railway from interfering with, influencing or coercing any of its mechanical department employees with respect to their right of selecting or designating representatives; from organizing, promoting, fostering or being in anywise concerned with the organization, fostering, maintenance or encouraging of any association of such employees with the intent or with the purpose of in anywise interfering with the Federation, or any successor representative, in violation of the Railway Labor Act; from preventing or discouraging such employees from becoming or remaining members of the Federation; and from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees [which include the carmen and coach cleaners], save and except only with the complainant, System Federation No. 40".

There is no evidence that the Railway participated in, authorized or ratified the acts of the master mechanic, car foreman or workmen testified to or any other acts tending to support the findings on which the injunction awarded by paragraph 2 of the decree, insofar as it relates thereto, is based, or even that it had any knowledge of such acts, other than the assistance in "smoothing out" the constitution of the Association in 1922, the posting of the bulletins, the issuance of the Sasser statement, and the financial assistance formerly given to the Association. The uncontradicted testimony is to the contrary (R. 144, 145, 159, 176, 180, 186). There is no evidence or finding of threats.

The Circuit Court of Appeals in an opinion filed June 18, 1936 (R. 311), held that the decree of the District Court should be affirmed and affirmed it by decree entered the same day (R. 340).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

I. In holding that Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class (in this case the Federation), imposes a legally enforceable obligation upon the carrier to negotiate with the representative so certified.

II. In failing to hold that, if Section 2, Ninth, of the Railway Labor Act requires the Railway to negotiate with the Federation, it is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

III. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

IV. In failing to hold that the certification of the Mediation Board is a nullity (a) because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, and (b) because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

V. In failing to hold that an injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of em-

ployees not participated in, ratified or authorized by the Railway should not have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

VI. In holding that Section 9 of the Norris-LaGuardia Act does not prohibit the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

VII. In affirming the decree of the District Court.

SUMMARY OF ARGUMENT.

I.

Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class, does not impose a legally enforceable obligation upon the carrier to negotiate with the representative so certified. Congress did not use the phrase "treat with" in the sense of "negotiate with", but in its very usual sense of "act towards" or "regard", the meaning urged upon the court below not only by the Railway but by the United States as *Amicus Curiae*. The history of the Railway Labor Act fully supports the conclusion that Section 2, Ninth, was not intended to impose an obligation to negotiate. Moreover, if Section 2, Ninth, imposes a legally enforceable obligation to negotiate, it violates the due process clause of the Fifth Amendment and this is an additional reason for holding that the construction of the Circuit Court of Appeals should be rejected.

Even if Congress, by Section 2, Ninth, intended to impose a legally enforceable obligation upon carriers to

negotiate with representatives certified by the Mediation Board, which the Railway denies, the obligation is an imperfect one, not enforceable in terms; accordingly one beyond the power of courts of equity to enforce.

II.

If Section 2, Ninth, of the Act requires the Railway to negotiate with the Federation, it is unconstitutional in that it violates the due process clause of the Fifth Amendment. Negotiation with respect to the terms of a contract is part of the contractual process and since the employer cannot be compelled to take the ultimate step represented by the agreement of contract, it is plain that he cannot be compelled to take the initial steps looking towards the agreement of contract. As viewed by the Fifth Amendment, the contractual process is a single process, indivisible and entire; all elements of that process, without distinction among them, enjoy the same protection. It is every man's civil right to be left at liberty to refuse, for any reason, business relations with any person whomsoever.

The abridgement of liberty of contract here attempted is arbitrary and unreasonable. The statutory direction to treat, as interpreted by the Circuit Court of Appeals, is utterly futile. Negotiation is entirely a matter of state of mind, a condition in its nature completely beyond legislative or judicial control.

Furthermore, the Circuit Court of Appeals construed the Act as preventing the Railway from contracting with anyone except the Federation. The Railway is thus deprived of the right to bargain or contract with those of its employees who do not desire representation by the Federation. If the Act empowers the majority of any

craft or class of employees to speak for the minority, in effect it delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority may be willing to make, in violation of the due process clause of the Fifth Amendment.

III.

The Railway Labor Act in terms applies to carriers' employees engaged solely in intrastate activities not directly affecting or burdening interstate commerce. The work of the back-shop employees of the Railway is manufacture and, as this Court has long held, manufacture is not commerce. It was held below that the back-shop employees were subject to Federal regulation because a strike by such workers might interfere with the interstate activities of the Railway. The strike standard is entirely inadequate and untenable. It does not possess the necessary characteristic of a standard. By the strike standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as any interruption of such activities by strikes would, to some extent, affect the stream of interstate commerce. The strike standard is also untenable because, as a matter of fact, a strike of the back-shop employees resulting in a total shutdown of the back shop would not directly interfere with the interstate operations of the Railway. All the work done in the back shop could be handled by outside shops. Furthermore this Court may take judicial notice of the fact that carriers by railroad subject to the Act have other employees whose activities do not directly affect or burden interstate commerce.

The Act in terms applies to employees of interstate carriers irrespective of the fact that some employees may

be engaged solely in intrastate activities which do not affect or burden interstate commerce. It is well settled that when, in the attempted exercise of duly delegated Federal power, an act purports to regulate activities both within and without the scope of Federal power without distinction between the two, it is wholly void. In this situation the courts are bound to declare the act void as an entirety. They cannot merely hold it invalid in its application to intrastate activities.

IV.

The certification of the Mediation Board fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election. Section 2, Fourth, requires that, to be elected, such representative receive the votes of a majority of all the eligible members of such craft or class. To hold otherwise means that less than a majority have the right to choose such representative and thus control the terms of agreements concerning rates of pay, rules and working conditions of all members of the craft or class. Such a construction is contrary to the manifest purpose of the Act, and is also contrary to the administrative interpretation adopted by the Mediation Board prior to the decision of the District Court in this case.

The certification does not contain sufficient findings of fact to show compliance with this requirement of Section 2, Fourth, and therefore does not meet the requirements declared by this Court to be essential in such a case; accordingly it is a nullity.

The certification improperly includes in the votes which it reports the votes of back-shop employees en-

gaged solely in intrastate activities not directly affecting or burdening interstate commerce. The certification is therefore a nullity for the additional reason that it is impossible to tell from it, for any craft, what the result of the election would have been if the votes of the backshop employees had not been included.

V.

The injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway should not have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act. Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence.

All that the bulletins and the Sasser statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. Under the provisions of Sections 6 and 7 (a) the acts of employees complained of could not legally be made the basis of an injunction against the Railway. With respect to such acts, there is no proof whatsoever of participation therein, or authorization or ratification thereof, by the Railway.

VI.

Section 9 of the Norris-LaGuardia Act provides that every injunction granted in a case involving or growing out of a labor dispute "shall include only a prohibition" of acts complained of in the bill of complaint. The mandatory injunction awarded by paragraph 1 of the decree is not "only a prohibition" and is therefore beyond the powers of a Federal court of equity as restricted by this section.

ARGUMENT.

I. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT, WHICH PROVIDES THAT A CARRIER SHALL TREAT WITH THE REPRESENTATIVE OF A CRAFT OR CLASS CERTIFIED BY THE MEDIATION BOARD AS THE REPRESENTATIVE OF SUCH CRAFT OR CLASS (IN THIS CASE THE FEDERATION), DOES NOT IMPOSE A LEGALLY ENFORCEABLE OBLIGATION UPON THE CARRIER TO NEGOTIATE WITH THE REPRESENTATIVE SO CERTIFIED.

(a) Congress did not intend, by Section 2, Ninth, to impose a legally enforceable obligation to negotiate.

Paragraph 1 of the decree of the District Court (R. 282) awards a mandatory injunction requiring that the Railway "shall treat with" the Federation and "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of the defendant growing out of any dispute between the defendant and the mechanical department employees thereof". Paragraph 2 of the decree, among other things, enjoins the Railway from "entering into any contract,

undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees'' except with the Federation (R. 282-283).

The above mentioned portions of the decree are based, it is submitted, upon a misconstruction of Section 2, Ninth, of the Railway Labor Act. This paragraph, which was added to the Railway Labor Act of 1926 by the 1934 Amendments, provides that in case of a dispute among a carrier's employees as to who are their representatives, the carrier ''shall treat with the representative'' certified as such by the Mediation Board ''as the representative of the craft or class'' of employees, involved in the dispute, for the purposes of the Act. The portion of paragraph 1 of the decree which requires the Railway to ''exert every reasonable effort to make and maintain agreements'', etc., follows the exact wording of Section 2, First, of the Railway Labor Act of 1926, which was continued by the 1934 Amendments *without change*. The Circuit Court of Appeals held ''treat with'' in Section 2, Ninth, to mean ''negotiate with'' (R. 320-321) and presumably this portion of paragraph 1 of the decree was upheld as a definition of the negotiations the Railway was required thereby to undertake.

In *Malone v. Gardner*, 62 F. (2d) 15, 18-20 (C. C. A. 4th, 1932), the Circuit Court of Appeals held Section 2, First, of the Railway Labor Act to be a general admonition or declaration of duty, indicating what Congress wished the parties to the dispute to do, but not intended to be a positive obligatory law creating enforceable duties, citing in support of its holding this Court's review of the Railway Labor Act in *Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548 (1930),

and its construction of the Transportation Act, 1920 (41 Stat. 469), in *Pennsylvania Railroad System v. Pennsylvania R. Co.*, 267 U. S. 203 (1925). In the present case, however, the Circuit Court of Appeals, while citing its decision in *Malone v. Gardner*, *supra*, with apparent approval (R. 319), affirmed a decree awarding a mandatory injunction requiring the Railway to do exactly what it had held in that case was an unenforceable duty. It rested the authority to award such an injunction and its affirmance, not upon any change in Section 2, First (as pointed out above this provision was continued unchanged), not upon any change in its construction (it apparently approves its original construction), but solely upon the addition to the Railway Labor Act of the provision in Section 2, Ninth, that carriers "shall treat with" representatives certified by the Mediation Board as the representatives of their employees for the purposes of the Act (R. 320-321). In other words, it held, in effect, that an admittedly unenforceable duty "to exert every reasonable effort to make and maintain agreements" had been transformed into a legally enforceable one by the mere addition to the statute of a requirement that carriers "shall treat with" representatives certified as aforesaid as the representatives of their employees for the purposes of the Act. To put it another way, the Court seems to have felt that, while a direction to negotiate for specified purposes (Section 2, First), was legally unenforceable, such direction was made legally enforceable by the addition to the statute of (what it construed to be) a direction to "negotiate" for any of the purposes of the Act (Section 2, Ninth).

Even if Congress had the power to do so, it is clear that it did not intend to make any such change in the law, and did not, as the Circuit Court of Appeals thought, use

"treat with" in the sense of "negotiate with", but in its very usual sense* of "act towards" or "regard", the meaning of the phrase urged upon the Court below not only by the Railway but by the United States as *Amicus Curiae.***

First, the duty imposed by Section 2, Ninth, is not "to treat with the representative of the craft or class certified by the Mediation Board" and therefore subject to the construction that Congress intended to impose thereby a duty to negotiate; the duty imposed is to treat with the representative so certified *"as the representative of the craft or class."**** The decree ignores the phrase in italics. If Congress had used "treat with" in the sense of "negotiate with" it would not have included that phrase.

**The Century Dictionary* (1897) gives as the primary meaning of the verb "treat" in its transitive sense, "To behave to or toward", and, among other meanings, "To look upon; consider; regard". The *American Oxford Dictionary* (1931) gives as the primary meaning, "Act or behave towards in specified way". Other dictionaries give similar definitions. The superfluous addition of the word "with", as in Section 2, Ninth, is common in this country; for example, in the phrase "visit with", as to which see Horwill, *Modern American Usage* (1935), p. 341.

**"With respect to this question, the Government wishes merely to point out that requiring a carrier to 'treat with' the selected representatives of the employees does not require the carrier to enter into contracts with them *but only to recognize the persons chosen by the employees as the agents of the employees.* This does not interfere with any property rights of the carrier in such a way as to violate the due process clause, since the carrier has no right to participate in the determination of employee representatives." (*Brief for the United States as Amicus Curiae in Support of the Constitutionality of the Railway Labor Act as here Applied*, page 3, filed in the Circuit Court of Appeals in this case.)

*** It may be assumed that all italics are supplied.

Second, this construction is fully supported by related provisions of the Act and by its history.

Section 2, Second, of the Act provides that "All *disputes* between a carrier or carriers and its or their employees *shall be considered, and, if possible, decided,* with all expedition, *in conference between representatives designated and authorized so to confer,* respectively, by the carrier or carriers and by the employees thereof interested in the dispute." This paragraph was derived from Section 301 of the Transportation Act, 1920, which contained the controlling wording italicized above. In the face of the argument that it would "make the act meaningless and wholly ineffective if under the act the parties may not be forced to a conference", (an argument identical in substance with the reasoning of the Circuit Court of Appeals in this case (R. 317)), this Court held, in *Pennsylvania Railroad System v. Pennsylvania Railroad Company,* 267 U. S. 203, 216-217 (1925), that Section 301 of the Transportation Act, 1920, imposed a legally unenforceable duty. Congress must have intended that Section 2, Second, should likewise be construed as imposing a legally unenforceable duty; otherwise it would not have continued therein the same controlling wording.*

* That this was the intention of Congress is made doubly clear by Section 5, First, which prescribes the procedure to be followed when disputes are not adjusted in conference *"or where conferences are refused."* Either party may invoke the services of the Mediation Board; the Board is to use its best efforts, by mediation, to bring the parties to agreement; and, failing that, is to endeavor "as its final required action" (with exceptions here immaterial) to induce them to submit their controversy to arbitration. At no point is there any suggestion that either party may by legal action force the other to a conference. Section 5, First, in providing for mediation where conferences are refused, assumes the contrary to be the case.

Section 2, Second, which thus imposes a legally unenforceable duty to consider disputes in conference, applies to all carriers, including necessarily carriers whose employees' representatives have been certified by the Mediation Board under Section 2, Ninth, as well as carriers whose employees' representatives have not been so certified.* But under the Circuit Court of Appeals' construction of the phrase "treat with" in Section 2, Ninth, carriers whose employees happen to have had disputes among themselves as to who are their representatives, and in consequence have representatives certified by the Mediation Board, are under a legally enforceable duty to negotiate with the representatives of their employees, while the duty of all other carriers in this regard remains legally unenforceable. It is submitted that Congress could not have intended to make a distinction of that kind. A construction of the Act which brings about such an anomalous result should, if possible, be avoided, and it can be avoided by construing the phrase "treat with" in its very usual sense of "act towards" or "regard". (*Supra*, p. 20).

Furthermore, even if Congress used the phrase "treat with" in Section 2, Ninth, in the sense of "negotiate with", it does not follow that it intended thereby to impose a legally enforceable duty. A requirement that carriers shall negotiate with representatives of employees for the purposes of the Act (Section 2, Ninth, as construed below) is tantamount to a requirement that they shall consider disputes in conference with such representatives (Section 2, Second), particularly in view of the fact that the Act was passed to provide for the "dis-

* The opening sentence of Section 2, Ninth, makes it clear that Section 2, Ninth, has no application except to a case in which a dispute arises among a carrier's employees as to who are the representatives of such employees.

position of disputes". Consequently, if "treat with" means "negotiate with", Section 2, Ninth, should be construed to impose a legally unenforceable obligation similar to the legally unenforceable obligation imposed by Section 2, Second (*Supra*, p. 21).

The history of the Railway Labor Act fully supports the conclusion that Section 2, Ninth, was not intended to impose an obligation to negotiate.

The essential characteristic of the Railway Labor Act of 1926 was that it provided a voluntary scheme for the adjustment of the relations between carriers and their employees. This characteristic was recognized by this Court in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930), in which the Chief Justice said (p. 569):

> "Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success *on the uncoerced action of each party* through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment [by Section 2, Third, of the Railway Labor Act of 1926] of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded."

The purpose of Congress in adding Section 2, Ninth, to the Railway Labor Act of 1926 is apparent from the following statement which appears in the report from

the Committee on Interstate and Foreign Commerce of the House of Representatives to accompany H. R. 9861, the bill which enacted the 1934 Amendments to the Railway Labor Act (Report No. 1944, *infra*, Appendix p. 77):

> "6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, *but it does not provide the machinery necessary to determine who are to be such representatives.* These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect."

It is apparent that Section 2, Ninth, was intended to provide the machinery for determining the representatives of employees in cases of disputes between employees as to who are such representatives, and that it was not intended to do away with the voluntary scheme of the Act. This is also made clear by the statement in the Committee Report that the 1934 Amendments did "*not introduce any new principles into the existing Railway Labor Act*" and did "*not change the methods of conference, mediation, and voluntary arbitration* to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926."

When read in the light of this background, the meaning of Section 2, Ninth, is unambiguous. The first sentence of Section 2, Ninth, provides that if any dispute shall arise among employees as to who are the representatives of such employees, it shall be the duty of the Mediation Board to investigate such dispute and to certify to both parties and the carrier the names of the individuals or organizations that have been designated to represent the employees. The second sentence then provides that "upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." The latter sentence means only that if and when the carrier, after such a dispute and certification, desires to deal with a representative of the craft or class involved, it must treat with the person or organization, found by the Mediation Board to be the authorized representative, as the authorized representative, and not with someone else. It does not mean that as a consequence of a dispute and certification (but not otherwise), the carrier is under a legally enforceable obligation to negotiate with a representative of its employees. To so hold is not only to ignore the "voluntary scheme" of the Act which the Chief Justice in the *Texas* case said was its "essence", but to impute to Congress the unlikely intention of creating a duty on the part of a carrier to negotiate with a representative of its employees, enforceable when, but only when, its employees have had a dispute as to who that representative shall be.

It is clear that Congress did not intend, by Section 2, Ninth, of the Act, to impose upon carriers a duty to negotiate with representatives of their employees, but used the phrase "treat with" in the very usual sense of "act towards" or "regard". And even if Congress used the phrase "treat with" in the sense of "negotiate with", it

is obvious that it did not intend thereby to create a legally enforceable obligation to negotiate.

Moreover, as will be shown (*infra,* pp. 29-38), if Section 2, Ninth, imposes a legally enforceable obligation to negotiate, it violates the due process clause of the Fifth Amendment, and this is an additional reason for holding that the construction of the Circuit Court of Appeals in this case is erroneous.

For the reasons aforesaid it is submitted that the mandatory injunction requiring the Railway to negotiate with the Federation should not have been awarded.

(b) A duty to negotiate is an imperfect obligation not enforceable in terms; accordingly it is beyond the power of courts of equity to enforce.

That an affirmative declaration of a duty to negotiate may be of imperfect obligation because not enforceable in terms and accordingly beyond the powers of a court of equity to enforce is recognized by this Court.*

As noted above the Circuit Court of Appeals held (erroneously, it is submitted) that "treat with" in Section 2, Ninth, was used in the sense of "negotiate with" and, based on this view, affirmed a decree granting a mandatory injunction requiring the Railway to negotiate with the Federation. But negotiation depends upon the feel-

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* In *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 568 (1930), this Court said:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

ings, desires and mental attitude of those negotiating, and these are completely beyond judicial control. In order to negotiate in good faith, one must have the desire and the will to negotiate and this implies the existence of a desire to make an agreement upon the best terms possible and to make counter proposals if necessary and do everything else that constitutes bargaining. It is easy to imagine demands, made upon a carrier by its employees, so unreasonable that the carrier could not for an instant consider acceding thereto to any extent whatsoever. May the carrier, nevertheless, negotiate without any good faith intention of acceding to such demands to any extent? The answer must be in the negative—one cannot be said, for example, to negotiate for the purchase of a house if he have a settled determination never to buy a house on any terms.

The following statement of the powers of a court of equity under similar circumstances appears in the opinion of Story, J., in *Tobey v. Bristol,* Fed. Cas. No. 14,065, at p. 1321 (C. C. Mass., 1845):

> "And this leads me to remark in the second place, that it is an established principle of courts of equity never to enforce the specific performance of any agreement, where it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement, impracticable or inequitable, to be enforced. 2 Story, Eq. Jur. § 959a. Thus, for example, courts of equity will not decree the specific performance of an agreement for a partnership in business, where it is to be merely doing the pleasure of both parties, because it may be forthwith dissolved by either party. See Story, Partn. §§ 189, 190, and Colly. Partn. (2d Ed.) bk. 2, pp. 132, 133, c. 2, § 2; 1 Story, Eq. Jur. § 666, and the cases there cited; Crawshay v. Maule, 1 Swanst. 515, the reporter's note. So, upon the like ground, courts of equity will not decree the specific perform-

> ance of a contract by an author to write dramatic performances for a particular theatre, although it will restrain him from writing for another theatre, if he has contracted not to do so (2 Story, Eq. Jur. § 959a; Morris v. Colman, 18 Ves. 437; Clarke v. Price, 3 Wils. Ch. 157; Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393); nor will they compel the specific performance of a contract by an actor to act a specified number of nights at a particular theatre (Kemble v. Kean, 6 Sim. 333); nor will they compel the specific performance of a contract to furnish maps to be engraved and published by the other party (Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393). In all these cases the reason is the same, the utter inadequacy of the means of the court to enforce the due performance of such a contract. The same principle would apply to the case of a specific contract by a master to paint an historical picture, or a contract by a sculptor to carve a statue or a group, historical or otherwise. From their very nature, all such contracts must depend for their due execution, upon the skill, and will, and honor of the contracting party."

Not only is the attempted enforcement against the carrier of the provisions of Section 2, Ninth, as construed by the Circuit Court of Appeals, impracticable for the foregoing reasons, but it is a vain and imperfect act because the carrier cannot be compelled to take the ultimate step represented by the agreement of contract.

The following statement of the rule in the analogous case of arbitration appears in *Pomeroy's Equity Jurisprudence*, (4 ed.), at §2180:

> "An agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitra-

tors to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties."

It follows that even if Congress, by Section 2, Ninth, of the Railway Labor Act, intended to impose a legally enforceable obligation upon carriers to negotiate with representatives certified by the Mediation Board, which the Railway denies, the obligation is an imperfect one, not enforceable in terms and beyond the powers of courts of equity to enforce. Accordingly the mandatory injunction requiring the Railway to negotiate with the Federation and the injunction restraining it from contracting with anyone else should not have been awarded.

II. IF SECTION 2, NINTH, OF THE RAILWAY LABOR ACT REQUIRES THE RAILWAY TO NEGOTIATE WITH THE FEDERATION, IT IS UNCONSTITUTIONAL IN THAT IT DEPRIVES THE RAILWAY OF ITS LIBERTY AND PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court of Appeals construed Section 2, Ninth, of the Railway Labor Act as imposing a legally enforceable obligation upon a carrier to negotiate with the representative certified by the Mediation Board and as precluding the carrier from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its employees except with such representative. In accordance with this construction it upheld the mandatory injunction awarded by paragraph 1 of the decree directing the Railway to "treat with" (meaning "negotiate with") the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes" and also the injunction awarded by paragraph 2 of the decree restrain-

ing the Railway from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees," except with the Federation (R. 282-283). It is submitted that Section 2, Ninth, of the Act so construed is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

(a) The mandatory injunction directing the Railway to negotiate with the representative certified by the Mediation Board and exert every reasonable effort to make and maintain agreements and to settle disputes is a violation of the due process clause of the Fifth Amendment.

This Court has long held that the employer-employee relationship, particularly the freedom of employers and employees to deal with each other on equal and voluntary terms, is subject to the protection of the due process clauses of the Fifth and Fourteenth Amendments. *Lochner v. New York,* 198 U. S. 45, 53 (1905); *Adair v. United States,* 208 U. S. 161, 173 (1908); *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 250 (1917); *Morehead v. Tipaldo,* 298 U. S. 587 (1936). It has held further that the liberty to refrain from entering into contracts is a part of liberty of contract, so that legislation which compels the making of agreements is a violation of fundamental rights and is void. *Coppage v. Kansas,* 236 U. S. 1, 20 (1915). Liberty of contract as a right is, of course, not absolute, but qualified. *Nebbia v. New York,* 291 U. S. 502, 523 (1934). But as this Court has stated only recently, "Legislative abridgment of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception." *Morehead v. Tipaldo, supra.*

It should be observed at the outset that there are no "exceptional circumstances," no imminent "disaster" (*Wilson v. New*, 243 U. S. 332, 342 (1917)), no unusual "danger" (*Holden v. Hardy*, 169 U. S. 366, 393 (1898)), no "desperate" situation (*Nebbia v. New York*, 291 U. S. 502, 515 (1934)) or no element of "deception" (*Hall v. Geiger-Jones Co.*, 242 U. S. 539, 551 (1917)), present in this case which requires the abridgment of basic rights such as is here attempted. The Railway Labor Act is permanent legislation calculated to control relationships of carriers and their employees as a lasting matter. The validity of the Railway Labor Act has been sustained by this Court only as a "voluntary scheme" involving no invasion of contract relationships. *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930). See also *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72 (1923); *Pennsylvania Railroad System v. Pennsylvania R. Co.*, 267 U. S. 203 (1925).

As construed by the Circuit Court of Appeals, the Act no longer provides a system for the voluntary adjustment of labor disputes as distinguished from a system of compulsion, which former system, in the *Texas* case, *supra*, was stated to be its "essence." The Circuit Court of Appeals holds that Section 2, Ninth, of the Act establishes a system of compulsion, at least so far as the carrier is concerned. It is significant to note that no similar system of compulsion is imposed thereby upon the employees. They are under no corresponding duty to negotiate with the representatives of the carrier.

That the Act as so construed violates the due process clause of the Fifth Amendment is clear from many decisions of this Court. Negotiation with respect to the

terms of the contract is a part of the contractual process and since the employer cannot be compelled to take the ultimate step represented by the agreement of contract (*Coppage v. Kansas, supra*), it is plain that he cannot be compelled to take the initial steps looking towards the agreement of contract. As viewed by the Fifth Amendment the contractual process is a single process, indivisible and entire; all elements of that process, without distinction among them, enjoy the same protection. In the *Adair* case this Court (at p. 173) quoted with approval the following from *Cooley on Torts:*

> "It is a part of every man's civil rights that he be left at liberty *to refuse business relations* with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have *business relations* with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

The doctrine that liberty of contract includes liberty to refuse to have business relations to any extent has been exemplified in the cases upholding the right of every man to deal with or refuse to deal with, any man, or class of men as he sees fit, whatever his motive, or whatever the resulting injury, without being held in any way accountable therefor (*Federal Trade Commission v. Raymond Brothers-Clark Company*, 263 U. S. 565 (1924); *United States v. Colgate & Company*, 250 U. S. 300 (1919); *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433 (1910); *Great Atlantic and Pacific Tea Company v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d., 1915)), and in the cases striking down schemes of compulsory arbitration (*Wolff Packing Co. v. Court of Industrial Relations*, 267

U. S. 552, 569 (1925); *Dorchy v. Kansas*, 264 U. S. 286 (1924)).*

Furthermore, in construing the Transportation Act, 1920, this Court has twice strongly intimated that legislation establishing compulsory negotiation would violate the Fifth Amendment.

In the first *Pennsylvania Case* (*Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72, 84, 85 (1923)) the carrier objected that the Labor

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* This Court's interpretation of the word "liberty" as used in the Fifth Amendment has been well summarized in 3 Willoughby on the Constitution of the United States (2nd ed. 1929), 1802, as follows:

> "In further protection of the substantive rights of individuals against public regulation the courts have developed a broad conception of 'liberty' which makes it include not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into contractual relations. So far as the use of one's private property is concerned, the right is viewed as also a property right as has earlier appeared. So far as the right to enter into contracts is concerned, it also is sometimes viewed as a property right, but more often as included within the broadened conception of liberty."

See also the well-known definition by this Court in *Allgeyer v. Louisiana* 165 U. S. 578, 589 (1897):

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Board compelled it to recognize labor unions as factors in the conduct of its business. The Court said:

> "The statute does not require the railway company to recognize or to *deal with or confer with labor unions*. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives *ought* to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. * * *
>
> "All that we may do in this case is to hold, as we do, that they [the Labor Board's decisions] were within the lawful function of the board to render, and, *not being compulsory*, violate no legal or equitable right of the complaining company."

The intimation that a mandatory order to negotiate would violate due process is repeated in the second *Pennsylvania Case* (*Pennsylvania Railroad System v. Pennsylvania Railroad Company*, 267 U. S. 203, 217 (1925)). The labor organization charged in this case that the Pennsylvania Railroad had failed to comply with the decision of the Labor Board *in refusing to confer* with representatives of the labor organization. The Court said:

> "All these things it [the railroad] might do and remain within its strict legal rights."

This Court also emphasized the sanction of publication and public opinion. It is important to note, moreover, that there is a limitation even upon this form of sanction. In *Holcombe v. Creamer*, 231 Mass. 99, 109, 120 N. E. 354, 359 (1918), the Court, while holding legislation valid on the ground that no legal compulsion was imposed on employers and employees which interfered with their liberty of contract, nevertheless held that compulsion

through the force of public opinion might reach a point where legislation having for its purpose the mobilization of public opinion in support of the recommendations of a labor board would become unconstitutional. The Court said:

> "The coercion resulting from legislation, in form not compulsory, may in practice be so severe as to leave no alternative save compliance. In such a case its validity would depend not upon its form but its substance."

Nothing contained in the *Texas* case is in any way contrary to the views here expressed.* The Circuit Court of Appeals, however, thought that the contention now urged by the Railway had been resolved adversely to it in that case. But the Railway Labor Act of 1926, or more correctly the provision thereof in controversy in the case,** was expressly upheld therein upon the ground that it did not interfere with the employer's liberty of contract. In the *Texas* case this Court said (at pp. 570-571):

> "The petitioners invoke the principle declared in Adair v. United States, 208 U. S. 161, and Coppage v. Kansas, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge

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*It is true that in the *Texas* case there was an order in contempt proceedings directing the railroad to reinstate the Brotherhood as the representative of the employees until an election could be held. This order, however, was not made to enforce a statutory obligation, but to require the restoration of the *status quo* as a condition of purging the railroad of contempt.

** In the *Texas* case (at pp. 557-558) this Court quoted Section 2, Third, of the Act, the paragraph providing that representatives shall be chosen "without interference, influence, or coercion", and said:

> "The controversy is with respect to the construction, validity and application of this statutory provision."

> them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."

The distinction between the cases involving the right of employers to hire and discharge employees at will and the cases involving the right of employees to belong to labor unions and select their representatives without interference is pointed out and emphasized by a decision of the Court of Appeals of New York, in which the above quoted excerpt from the *Texas* case was referred to and quoted in part in the opinion. *Sherman v. Abeles*, 265 N. Y. 383, 193 N. E. 241 (1934).

Finally, the abridgment of liberty of contract here attempted is arbitrary and unreasonable. It is not only beyond the limits of effective Federal statutory control, it is beyond the limits, as we have shown above, of the powers of a court of equity (*supra*, pp. 26-29). As Judge Story pointed out long ago, in *Tobey v. Bristol*, Fed. Cas. No. 14065, at p. 1321 (C. C. Mass., 1845), the courts have uniformly refused to enforce contracts for personal services depending upon the will and skill of the contracting parties. "In all these cases", he wrote, "the reason is the same, the utter inadequacy of the means of the court to enforce the due performance of such a contract." Here the statutory direction to "treat with", if "treat with" means "negotiate with", is utterly futile. Negotiation is entirely a matter of state of mind, a condition in its nature completely beyond legislative or judicial control. Furthermore, the direction to negotiate is also futile since the ultimate result of any conference is admittedly without the scope of control.

(b) The injunction restraining the Railway from contracting with anyone except the Federation is a violation of the due process clause of the Fifth Amendment.

Paragraph 2 of the decree enjoins the Railway from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation (R. 283). The Circuit Court of Appeals, by affirmance, has construed the Railway Labor Act as forbidding a carrier, when a representative of employees has been certified by the Mediation Board under Section 2, Ninth, from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting such employees except with such representative. Thus the carrier is deprived of the right to bargain or contract with those of its employees who do not desire such representation; and this is so whether the carrier desires to contract directly with an individual in the minority or indirectly through an organization by which the minority desires to be represented. If the Act empowers the majority to speak for the minority, it in effect delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority may be willing to make. A somewhat similar delegation to the majority of power to bind the minority was recently condemned by this Court in *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), as "legislative delegation in its most obnoxious form" and an "intolerable and unconstitutional interference with personal liberty and private property" in derogation of the due process clause of the Fifth Amendment.

Under the cases hereinabove cited, Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit

Court of Appeals, it is submitted, deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment.

III. THE RAILWAY LABOR ACT IS UNCONSTITUTIONAL IN ITS ENTIRETY IN THAT IT ATTEMPTS TO REGULATE LABOR RELATIONS BETWEEN CARRIERS AND EMPLOYEES ENGAGED SOLELY IN ACTIVITIES INTRASTATE IN CHARACTER WHICH DO NOT DIRECTLY AFFECT OR BURDEN INTERSTATE COMMERCE.

The Railway Labor Act in terms applies to employees of carriers engaged solely in intrastate activities not directly affecting or burdening interstate commerce. Of course, it is well settled that regulation of so much of a business as constitutes interstate commerce or directly affects or burdens such commerce cannot be extended to embrace purely intrastate activities. First *Employers' Liability Cases*, 207 U. S. 463 (1908); *Baltimore and Ohio Railroad Company v. Interstate Commerce Commission*, 221 U. S. 612 (1911). In this respect the Act is inseparable; it cannot be aided by construction or by the separability clause. The Act, accordingly, is invalid in its entirety.

(a) The Railway Labor Act does not exclude from its application employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

Section 1, Fifth, of the Railway Labor Act states that "the term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders

of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders. * * *" By its order dated April 18, 1921, approving the *Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation,* effective July 1, 1921, the Interstate Commerce Commission defined employees as follows:

> "The word *employees,* as used herein, is intended to include every person in the service of the reporting carrier subject to its continuing authority to supervise and direct the manner of rendition of his service. Persons engaged to render only specifically defined service and not subject to the continuing authority of the carrier to supervise and control their acts, such as customhouse brokers, lawyers retained only for specific cases and not under general or continuing retainer, etc., are not employees in the meaning of the term used herein." (*Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation,* Effective on July 1, 1921, Interstate Commerce Commission, Washington, Government Printing Office, 1921, p. 7).

The foregoing is the Interstate Commerce Commission's definition of "employees" in effect at the time of the passage of the Railway Labor Act of 1926 and still in effect. It is to be observed that the definition in the Act itself is patterned upon it. It is also to be observed that no distinction is attempted to be drawn between employees whose activities are interstate in character and employees whose activities are solely intrastate in character and do not directly affect or burden interstate commerce. It follows that the Railway Labor Act purports

to regulate the relations of carriers by railroad with all employees subject to their continuing authority to supervise and direct the manner of rendition of their services, including employees such as the back-shop employees of the Railway who are engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

(b) The Railway and other carriers subject to the Railway Labor Act have employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

It is clear from the evidence that the back-shop employees are engaged solely in intrastate activities and this was the conclusion reached by the District Court (R. 270) and adopted by the Circuit Court of Appeals (R. 313).

Approximately one-third of the employees in the mechanical department of the Railway work in the back shop at Princeton, West Virginia. As appears from the testimony, these back-shop employees (with the exception of one man who makes "running repairs" on a switch engine maintained at Princeton) are engaged in making "classified repairs" and in "store order work." Classified repairs are heavy repairs on locomotives and cars, such as rebuilding and putting them in shape for months of service. It is customary to distinguish heavy or classified repairs from light or running repairs. For the purpose of making classified repairs, the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. "Store order work" consists of manufacturing

material (such as rivets and repair parts) to be placed in stores at different points on the railroad. If the Railway can make these articles more cheaply than it can buy them, they are made at its back shop; otherwise they are bought on the market. (*Supra*, pp. 4-5).

It is the position of the Railway that such back-shop work is not so related to the interstate activities of the Railway as to admit of Federal regulation of the employer-employee relationships of such back-shop employees. This question, so far as the Railway has been able to discover, has not been directly decided by this Court. There is, however, ample authority in support of the Railway's position. In the first *Employers' Liability Cases*, 207 U. S. 463 (1908), this Court pointed out that although a carrier might be engaged in interstate commerce it might also transact business which was not interstate in character and which did not directly affect or burden interstate commerce. This Court mentioned work of the type performed by the Railway's back-shop employees at Princeton as an illustration of the latter. This Court said (at p. 498):

> "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of

interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. *Take again the same road having shops for repairs, and, it may be, for construction work,* as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

The recent decisions of this Court under the second *Federal Employers' Liability Act,* although not controlling on the question at issue, are also indicative of the Court's attitude towards the problem. In *New York, New Haven and Hartford Railroad Co. v. Bezue,* 284 U. S. 415 (1932), the leading case on the subject, this Court held that the criterion of applicability of the second *Federal Employers' Liability Act* was the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. The employee in that case, in laboring in the repair shop, was injured through the negligence of the foreman while assisting in returning a pair of main driving wheels from a lathe to the engine from which they had been removed for the purpose of

turning the journals. The locomotive had apparently been used in interstate service and had been brought to the shop for regular boiler wash. The repairs consumed twelve days and the employee was injured on the ninth day. The Court of Appeals of New York had affirmed a judgment in favor of the employee on the ground "that the terminal facilities in which respondent worked constitute a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce." This conclusion was rejected, however, by this Court. This Court said (at p. 419):

> "The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. * * *
>
> "The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. * * * Under the circumstances of this case, whether respondent is within the Act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in Industrial Acci. Commission v. Davis, 259 U. S. 182, and Minneapolis & St. L. R. Co. v. Winters, 242

> U. S. 353, stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as New York C. R. Co. v. Marcone, 281 U. S. 345, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run."

See, to same effect, *Industrial Accident Commission v. Davis,* 259 U. S. 182 (1922), and *Minneapolis and St. Louis R. Co. v. Winters,* 242 U. S. 353 (1917).

Furthermore, the work of the back-shop employees at Princeton is manufacture. This Court has long held that manufacture is not commerce. *Crescent Cotton Oil Company v. Mississippi,* 257 U. S. 129 (1921); *Carter v. Carter Coal Company,* 298 U. S. 238 (1936). As this Court has pointed out there is a broad and clear distinction between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce. *Kidd v. Pearson,* 128 U. S. 1, 20 (1888). That commodities produced or manufactured within a state are intended to be sold or transported outside the state or otherwise enter into commerce does not render their production or manufacture subject to Federal regulation under the commerce clause. *Carter v. Carter Coal Company, supra; Coe v. Errol,* 116 U. S. 517 (1886); *Arkadelphia Milling Company v. St. Louis, Southwestern Railway Company,* 249 U. S. 134 (1919); *Heisler v. Thomas Colliery Company,* 260 U. S. 245 (1922); *Chassaniol v. City of Greenwood,* 291 U. S. 584 (1934).

The Circuit Court of Appeals was of the opinion that back-shop employees are subject to Federal regulation because in the event of a strike by such workers the interstate activities of the Railway may be interfered with. There are at least two conclusive reasons why this test is entirely inadequate and untenable:

(1) It is untenable for the obvious reason that it does not possess the necessary characteristic of a standard. The chief characteristic of a standard is that it draws a dividing line so that it is possible to tell whether a particular class is on one side of the line or the other. The strike standard fails utterly as a dividing line because, by such standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as any interruption of such activities by strikes to some extent would affect the stream of interstate commerce. The back-shop work is just as local as similar work done by concerns such as the Baldwin Locomotive Works and the Virginia Bridge and Iron Works. It is clear under *Carter v. Carter Coal Company, supra,* that employer-employee relations in the case of these two concerns could not be subjected to Federal regulation on the ground that a strike or labor disturbance therein might interfere with interstate commerce. As was stated in the *Carter* case (pp. 308-309), the relation of such employers and employees is a local relation; and strikes of such employees are a local evil over which the Federal government has no legislative control, and such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. The mere fact that the Railway has chosen to perform such back-shop work itself does not render such work subject to Federal regulation. The Circuit Court of Appeals has failed to give proper consideration to the

fact that the Railway, in engaging in the back-shop work, is engaged in purely local activities that are as separate and apart from its transportation business as manufacturing or mining. *Carter v. Carter Coal Company, supra.*

(2) The strike test is also untenable because a strike of the back-shop employees resulting in a total shutdown of the back shop would not directly interfere with the interstate operations of the Railway. It is manifest from the testimony that the Railway could permanently close the Princeton shop tomorrow without occasioning any interruption to its interstate service. As the testimony shows, the back-shop employees have no connection with equipment in service. As the testimony also shows, all the work done in the back shop could be handled by outside shops such as those of the Baldwin Locomotive Works and the Virginia Bridge and Iron Works, and the material made at Princeton could be purchased in the market.

The Circuit Court of Appeals seeks to fill a gap which would otherwise exist in its reasoning by saying (R. 330) that "if labor disturbances of employees such as those who are involved here, warrant the exercise of injunctive power to prevent interference with interstate commerce, as was asserted by the defendant here in the shopmen's strike of 1922 and as held in *United States v. Railway Employees' Department,* 283 Fed. 479 and 290 Fed. 978, certainly Congress can take appropriate steps to prevent such interference in advance of the disturbance." But in the case of the Railway only one-third of the shopmen are back-shop employees and an examination of the opinions cited fails to disclose any basis for a statement that a strike of back-shop employees did or would directly interfere with interstate commerce. Direct interference with interstate com-

merce from a shopmen's strike is due, not to the back-shop employees, but to the shopmen employed in making running repairs.

It follows therefore that the activities of the back-shop employees are purely intrastate in character and do not directly affect or burden interstate commerce.

Moreover the Railway Labor Act is addressed to all carriers by railroad subject to the Interstate Commerce Act. As noted above it purports to regulate the relations of such carriers with all employees subject to their continuing authority to supervise and direct the manner of rendition of their services. Even if this Court should hold that the activities of back-shop employees directly affect or burden interstate commerce and, therefore, that such employees may be subjected to Federal regulation, it may nevertheless take judicial notice of the fact that at least some of such carriers have other employees whose activities do not directly affect or burden interstate commerce.*

(c) As an attempted regulation of intrastate activities, the Act is inseparable; it cannot be aided by construction or the separability clause.

(i) *As an attempted regulation of intrastate activities the Act is inseparable; it cannot be aided by construction.*

As we have shown above the Railway Labor Act in terms applies to all employees of interstate carriers irrespective of the fact that some of their employees may be engaged solely in intrastate activities which do not affect or burden interstate commerce; it applies, for example, to those engaged exclusively in work related to

* See the quotation from the first *Employers' Liability Cases, supra,* pp. 41-42.

the management, operation, care and protection of property not devoted to or used in connection with transportation. It is well settled that when, in the attempted exercise of duly delegated Federal power, an act attempts to regulate activities both within and outside the scope of Federal power without distinction between the two, it is wholly void. Under the decisions of this Court, if this situation exists, the courts are bound to declare the act void as an entirety. They cannot merely hold it invalid in its application to intrastate activities. This rule has been announced in many cases, a few of which will be discussed in detail.

(1) In *United States v. Reese*, 92 U. S. 214 (1876), this Court held unconstitutional the Act of May 31, 1870, 16 Stat. 140, which laid a penalty on state election officers for refusal to receive the vote of "any citizen" who had duly offered to qualify as a voter. An indictment was brought against two inspectors of a municipal election in the State of Kentucky for violation of the Act, which was not in terms limited to Federal elections. The Court held (at p. 221):

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not

now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

(2) In the *Trade-Mark Cases*, 100 U. S. 82 (1879), this Court held that the commerce clause gives to Congress no power to establish a general or universal system of trade-mark registration, that is, one which is not confined to trade-marks used in foreign or interstate commerce. Hence the Acts of 1870 and 1876, which were not in terms so confined, were held invalid. This Court said (at pp. 96-97):

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of

the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

"We find no recognition of this principle in the chapter on trade marks in the Revised Statutes."

(3) In *James v. Bowman*, 190 U. S. 127 (1903), this Court declined by judicial construction to limit the application of a statute to Federal elections which in terms provided for the punishment of bribery committed at all elections, without limiting the elections to Federal elections. It said (at p. 140):

"On its face it is clearly an attempt to exercise power supposed to be conferred by the 15th Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the 15th Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute."

(4) In *Illinois Central Railroad Company v. McKendree*, 203 U. S. 514 (1906), this Court held invalid quarantine regulations promulgated by the Secretary of Agri-

culture acting under cover of the Act of February 2, 1903. The Court said (at pp. 528-529):

> "The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

(5) In the first *Employers' Liability Cases, supra,* this Court held the *Federal Employers' Liability Act* of June 11, 1906, void on the ground that it was a regulation of intrastate as well as interstate commerce and, therefore, one beyond the power of Congress to enact. The Court expressly refused to write into the Act the words necessary to limit its application to interstate commerce.

The rule applied by the preceding cases was stated recently as follows by Mr. Justice Brandeis in his dissenting opinion in *Crowell v. Benson,* 285 U. S. 22, 76-77 (1932). The point was not touched upon in the majority opinion.

> "The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. Butts v. Merchants & M. Transp. Co., 230 U. S. 126, 133; Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 500-502; Trade-Mark Cases, 100 U. S. 82, 99; United States v. Fox, 95 U. S. 670, 672, 673; United States v. Reese, 92 U. S. 214, 221. Compare Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529; Cella Commission Co. v. Bohlinger, 147 Fed. 419, 423, 424."

When, therefore, as in the present case, an act of Congress is, by its terms, expressly made applicable to local activities beyond the power of Congressional regulation, it is null and void as an entirety. The courts may not declare it invalid only in so far as it relates to intrastate matters. To do so is to indulge in judicial legislation and to violate the principle announced in the preceding cases.

(ii) *The Act cannot be aided by the separability clause.*

Nor does the separability provision* save the Act or

*** See Section 8 of the 1934 Amendments and the footnote, Appendix p. 74.**

any part of it. It is well settled that when the court can make an act constitutional by striking out words or phrases it may do so, but it is also well settled that the court will not add words of limitation in order to make an invalid act valid. We quote below from *Hill v. Wallace,* 259 U. S. 44, 70-71 (1922), a recent statement of this traditional doctrine:

> "Section 11 of this act directs that 'if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.'
>
> "Section 4, with its penalty to secure compliance with the regulations of boards of trade, is so interwoven with those regulations that they cannot be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In United States v. Reese, 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):
>
> " 'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. • • • To limit this statute in the manner now asked for would be to make a

new law, not to enforce an old one. This is no part of our duty.' • • •

"To be sure in the cases cited there was no saving provision like §11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."

This doctrine was recently affirmed in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 361 (1935), in which the act under review contained a separability clause similar to that considered in *Hill v. Wallace*.

It is submitted that under the authorities aforesaid the Railway Labor Act is unconstitutional in its entirety.

IV. THE CERTIFICATION OF THE MEDIATION BOARD IS A NULLITY (A) BECAUSE IT FAILS TO SHOW THAT A MAJORITY OF ANY CRAFT OR CLASS OF EMPLOYEES VOTED IN FAVOR OF THE FEDERATION, OR EVEN THAT SUCH A MAJORITY PARTICIPATED IN THE ELECTION, AND (B) BECAUSE IT IS IMPOSSIBLE TO TELL FROM IT WHAT THE RESULT OF THE ELECTION WOULD HAVE BEEN WITHOUT THE VOTES OF THE BACK-SHOP EMPLOYEES.

The mandatory injunction awarded by paragraph 1 of the decree requiring the Railway to negotiate with the Federation and the part of paragraph 2 of the decree which enjoins the Railway from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation are grounded solely upon the certification of the Mediation

Board of the Federation as the representative of the mechanical department employees of the Railway. If this certification is a nullity, paragraph 1 of the decree and the part of paragraph 2 of the decree referred to above should be vacated. It is the contention of the Railway that this certification is a nullity for each of the two reasons hereinafter set forth.

(a) The certification of the Mediation Board is a nullity because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election.

(i) *Section 2, Fourth, of the Railway Labor Act requires, in an election to determine who is the representative of a craft or class, that the representative receive the votes of a majority of the eligible voters of such craft or class.*

The certification of the Mediation Board to the effect that the Federation has been duly designated and authorized to represent the mechanical department employees of the Railway shows on its face that the election on which it is based was conducted under a rule, agreed to by the candidates, "that the vote should be taken and counted separately for each of the shop crafts, and that each organization receiving a majority of the legal votes cast will be recognized as representative of the employees in question", thus permitting a choice to be made in any craft by less than a majority thereof. As will be shown hereafter, this is clearly an improper rule. Furthermore, the certification fails to show that a majority of any craft or class of employees eligible to vote voted in favor of the Federation, or even that such a majority participated in the election. (*Supra*, p. 7).

Section 2, Fourth, of the Railway Labor Act provides, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act". The District Court held that this statutory provision did not require the representative to receive the votes of a majority of all the eligible voters of a craft or class, but merely that a majority thereof actually participate in the election (R. 266-267). The Circuit Court of Appeals also held that if a majority of a craft participated in an election, a majority of those voting was sufficient to elect. It said, however, that it did not need to decide in this case whether the choice of a majority of those voting would also be valid if a majority of the eligible voters did not participate in the election (R. 339).

The lower courts, it is submitted, misinterpreted the statute in holding that Section 2, Fourth, does not require, in the case of an election to determine who is the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class.* The Railway believes that it re-

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* No light upon the construction of the sentence, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", is thrown by Committee Reports. The following, however, appears in the *Report from the Committee on Interstate Commerce, to accompany S. 3266, Senate, 73d Congress, 2d Session, Report No. 1065, May 10 (calendar day May 21), 1934, p. 2*:

> "The bill specifically provides that the choice of representatives of any craft shall be determined by a majority of the employees voting on the question."

It is submitted that this was not intended to mean that a majority of the votes cast would determine the choice, but that the choice would be determined by the vote of a majority of those having the right to vote. In any event, that is

quires that the representative receive the votes of a majority of all the eligible members of such craft or class; otherwise less than a majority would have the right to choose the representative and thus control the terms of agreements concerning rates of pay, rules and working conditions of all the members of the craft or class. It was the manifest purpose of Congress to provide a plan to eliminate as far as possible continual disagreements between carriers and employees and among the employees themselves. This purpose would be thwarted if a minority of a craft or class were permitted to determine such matters, because where less than a majority approves a designated representative there is a tendency for the losing party to seek another election and the issue may

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what the Hon. Joseph B. Eastman, Federal Coordinator of Transportation and proponent of the 1934 amendments, told the Committee on Interstate and Foreign Commerce of the House was the meaning of the sentence. On May 22, 1934, in answer to questions by Congressman Pettengill as to its meaning, he said,

> "* * * with that provision in paragraph 4, I think the rules would have to provide for *a majority of those who are determined to have the right to vote* * * * I think that the vote would have to be a majority of those that have the right to vote and participate in the elections. I would like to give that a little further consideration". (*Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-third Congress, Second Session, on H. R. 7650,* pp. 34-35.)

On the following day, Commissioner Eastman said (p. 44) that he would like to work out an amendment to "make clear the point with respect to what 'majority' means, which was raised in a question asked by Congressman Pettengill". No such amendment was adopted (or, as far as appears, presented), and it is to be assumed that the Committee was satisfied that the sentence expressed with sufficient clarity the meaning ascribed to it by Commissioner Eastman.

not be regarded as definitely settled until a majority of the eligible employees agree upon their choice.*

Moreover the interpretation of the lower courts is contrary to the administrative interpretation adopted by the Mediation Board prior to the decision of the District Court in this case. In the *Second Annual Report of the National Mediation Board, for the fiscal year ended June* 30, 1936, at page 11, the following statement appears:

> "(*a*) *Majority rule.*—During the year the Board, guided by decision of the courts, changed its ruling with respect to the majority required to determine

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* Mr. James W. Carmalt, a member of the National Mediation Board, in an address before the Fifth Organization Conference of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, at St. Louis, Missouri, in November of 1935, said:

> "The Railway Labor Act says that the majority of a class or craft shall have the right to determine who its representatives shall be. *Our Board has felt that it was good administration at least to read the Act strictly in accordance with its terms. In other words, to require that there be a majority of the eligible voters recorded in favor of one organization before we could issue a certificate to it. We have felt this was wise because it prevents slipshod organization work and leads to stability.* We have had several instances where the election was close, in which we have been requested almost immediately after it was concluded to hold another election. If there were a clear majority of the eligible voters recorded on one side or the other, the losing organization would not be active in further efforts to get control and the winning organization would be in much better position to negotiate with the management. * * * *The organization that obtains the contract by reason of a minority of the votes in a class will generally have rough sledding in the administration of the contract for the employees.*" ("*Railway Clerk*," Official Journal of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, December, 1935, p. 473.)

the election of representatives. In its first rules governing elections the Board had adopted the policy of requiring a majority of all those eligible to vote to determine the choice of representatives. The matter was taken to the courts, however, and Judge Way in the United States District Court for the Eastern District of Virginia ruled that only a majority of the legal votes cast was necessary, provided a majority of all the eligibles participated in the election. This ruling was upheld by the United States Circuit Court of Appeals for the Fourth Circuit.

"Following the court's ruling the Board had occasion to consider the question again in a representation dispute involving the shop employees of the Nashville, Chattanooga and St. Louis Railway Co. [Case No. R-170] in which the Board changed its ruling with respect to the required majority in the following language:

> In some elections heretofore held the Board has ruled, for administrative reasons, that it would not certify as the choice of representative by employes any individual or organization which failed to receive a majority of the eligible votes. By judicial decision and opinion of competent counsel, the Board is constrained now to hold that where a majority of the eligible voters participate in the election and all are given opportunity so to vote, a majority of the legal votes cast will determine the right to certification by the Board of the representation chosen by the class or craft.

This ruling is now generally accepted, but the Virginian Railway Co. proposes to pursue the litigation to the United States Supreme Court."*

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* It appears from the *First Annual Report of the Mediation Board* (*Report for the fiscal year ended* June 30, 1935), p. 19, that when the parties to a dispute agreed to be bound by a majority of the votes cast, the Mediation Board for a time certified on this basis. However, it is obvious that

(ii) *The certification of the Mediation Board does not show compliance with the statutory requirement.*

It is impossible to tell from the certification whether or not a majority of any craft or class of employees eligible to vote voted in favor of the Federation, or even whether or not such a majority participated in the election. Under these circumstances, it is submitted that the certification clearly does not contain sufficient findings of fact to meet the requirements declared by this Court to be essential in such a case, whether the construction of the District Court or that of the Railway be adopted.

Thus in *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, 505 (1935), it was said:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. Florida v. United States, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119; United States v. Baltimore & O. R. Co., January 7, 1935, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' Florida v. United States, 282 U. S. 194."

And in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 201, 202 (1935), this Court said:

> "But the Commission, in respect of the shipments covered by its order, made no definite finding as to

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agreements between candidates, as in this case, cannot change the requirements of the statute. The District Court so ruled and accordingly held the certification of the Federation as the representative of the carmen and coach cleaners to be "without force or effect" (R. 267, 280). No appeal was taken by the respondents from this ruling (R. 339).

what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. Florida v. United States, 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Ref. Co. v. Ryan, 293 U. S. 388, 433."

Under the above cases, it is submitted, the certification, under either construction of Section 2, Fourth, is a nullity.

(b) The certification is a nullity because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

The certification of the Mediation Board is based upon an election at which the back-shop employees were permitted to vote and accordingly includes in the votes which it reports the votes of such back-shop employees (*supra*, p. 7). These employees are engaged solely in intrastate activities not directly affecting or burdening interstate commerce (*supra*, pp. 38-47). They are not subject to Federal regulation and accordingly their votes should not have been included. The certification does not report the votes of the back-shop employees separately and it is impossible to tell from it, for any craft, what the result of the election would have been if the votes of the back-shop employees had not been included. For this reason also, it is submitted, the certification of the Mediation Board is a nullity under the cases cited, *supra*, p. 60.

V. THE INJUNCTION BOTTOMED ON PUBLICITY GIVEN BY THE RAILWAY TO THE EXISTENCE OF, AND THE FACTS INVOLVED IN, A LABOR DISPUTE AND ON ACTS OF EMPLOYEES NOT PARTICIPATED IN, RATIFIED OR AUTHORIZED BY THE RAILWAY SHOULD NOT HAVE BEEN AWARDED, PARTICULARLY IN VIEW OF THE PROVISIONS OF SECTIONS 4 (e), 6 AND 7 (a) OF THE NORRIS-LAGUARDIA ACT.

The injunction awarded by paragraph 2 of the decree of the District Court, except the part thereof enjoining the Railway from contracting with anyone but the Federation, is bottomed on the posting by the Railway of certain bulletins (*supra*, pp. 5-6), the issuance by it of the Sasser statement (*supra*, p. 6), and acts of employees in respect of which there is no proof whatsoever of participation, authorization or ratification by the Railway (*supra*, pp. 7, 10). There is no contention that any of the financial assistance formerly given to the Association was continued after it became unlawful to give it (*supra*, p. 5). There is no evidence or finding of threats (*supra*, p. 10).

It is submitted that the bulletins and the Sasser statement were proper communications from employer to employees, not constituting forbidden attempts to "influence" such employees, as the word "influence" is used in Section 2, Third and Fourth, of the Railway Labor Act as amended. (See *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 568 (1930), construing the word "influence" in Section 2, Third, of the Railway Labor Act of 1926, to mean "pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization' ").

Moreover, even if the bulletins or the Sasser statement were unlawful under the Railway Labor Act, they could

not legally be made the basis of an injunction against the Railway. Section 1 of the Norris-LaGuardia Act specifically provides that "no court of the United States * * * shall have jurisdiction to issue any * * * injunction in a case involving or growing out of a labor dispute, *except in a strict conformity with the provisions of this Act*". Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence. All that the bulletins and the statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. The decree in this case makes no attempt to exclude from its scope the giving of publicity which may not be enjoined. As an example, the Railway is enjoined, without qualification, from "discouraging its mechanical department employees from becoming or remaining members of the" Federation. Thus no publicity may be given to any facts about the Federation which would have that effect, such as the facts set forth in the Sasser statement.*

Section 6 of the Norris-LaGuardia Act provides that no "association or organization participating or interested in a labor dispute, shall be held responsible or liable * * * for the unlawful acts of individual officers,

---

*The Norris-LaGuardia Act was approved March 23, 1932; the *Texas* case, *supra*, was decided May 26, 1930. Hence the decision in that case has no bearing upon the validity of this point.

members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof"; and Section 7 (a) prohibits the issuance of an injunction on account of a threat or unlawful act, except against a person, association or organization making or committing, or authorizing or ratifying, such threat or act. Therefore the acts of employees aforesaid, even if otherwise a proper basis of injunction against the Railway, could not legally be made the ground of such an injunction.

It is submitted, therefore, that the part of the injunction awarded by paragraph 2 of the decree of the District Court which is bottomed upon the posting of the bulletins, the issuance of the Sasser statement and acts of employees should not have been awarded, particularly in view of the above mentioned provisions of the Norris-LaGuardia Act.

VI. SECTION 9 OF THE NORRIS-LAGUARDIA ACT PROHIBITS THE GRANTING BY A COURT OF THE UNITED STATES OF A MANDATORY INJUNCTION IN A CASE INVOLVING OR GROWING OUT OF A LABOR DISPUTE.

Section 9 of the Norris-LaGuardia Act provides in part as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute *shall include only a prohibition* of such specific act or acts as may be expressly complained of in the bill of complaint * * *."

The mandatory injunction awarded by paragraph 1 of the decree is not *"only a prohibition"* and therefore clearly contravenes Section 9 inasmuch as the District Court was, under said Section 9, without jurisdiction to issue a mandatory injunction in this case.

CONCLUSION.

Paragraph 1 of the decree and the part of paragraph 2 which enjoins the Railway from contracting with anyone but the Federation must both fall if this Court determines (a) that Section 2, Ninth, of the Railway Labor Act does not impose a legally enforceable duty to negotiate, or (b) that if construed to impose such a duty it violates the due process of law clause of the Fifth Amendment, or (c) that the Railway Labor Act is unconstitutional in its entirety, or (d) that for either of the reasons advanced the certification of the Mediation Board is a nullity. Paragraph 1 of the decree must also fall if this Court determines that, in any event, a mandatory injunction should not have been awarded in view of Section 9 of the Norris-LaGuardia Act.

The part of paragraph 2 of the decree which enjoins the Railway from contracting with anyone but the Federation must fall if this Court determines that the Railway Labor Act violates the due process clause of the Fifth Amendment if construed to prevent a carrier from contracting with anyone but the representative certified by the Mediation Board when one has been certified. The rest of paragraph 2 of the decree must fall if this Court determines (a) that the Railway Labor Act is unconstitutional in its entirety, or (b) that, particularly in view of the provisions of Sections 4(e), 6 and 7(a) of the Norris-LaGuardia Act, an injunction, bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway, could not properly be awarded.

For the reasons set forth herein, it is submitted that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JAMES PIPER,
H. T. HALL,
W. H. T. LOYALL,
JOHN C. DONNALLY,
Counsel for Petitioner.

On the Brief:
FRANCIS J. CAREY,
HUNTINGTON CAIRNS,
GEORGE S. NEWCOMER.

January, 1937.

APPENDIX.

EXCERPTS FROM 1934 AMENDMENTS TO THE RAILWAY LABOR ACT

Act of June 21, 1934, Chap. 691, 48 Stat. 1185.

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

* * * * * *

(USC Title 45, §151.)

Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all dis-

putes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (USC Title 45, §151a.)

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of

their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated con-

ferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of

their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent." (USC Title 45, §152.)

Sec. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

* * * * * *

(USC Title 45, §155.)

Sec. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.* (USC Title 45, § 161.)

EXCERPTS FROM THE NORRIS-LAGUARDIA ACT

Act of March 23, 1932, Chap. 90, 47 Stat. 70.

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (USC Title 29, §101.)

* * * * * *

---

* The following is Section 11 of the Railway Labor Act as enacted May 20, 1926 (44 Stat. 587):

> "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

The foregoing is the separability provision quoted by the Circuit Court of Appeals (R. 332). The Code of the Laws of the United States of America, 1934 edition, treats this provision as superseded by Section 8 of the 1934 Act.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * * * * *

(USC Title 29, §104.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. (USC Title 29, §106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization mak-

ing the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

* * * * * *

(USC Title 29, §107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (USC Title 29, §109.)

* * * * * *

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if re-

lief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * * * * *

(USC Title 29, §113.)

EXCERPT FROM REPORT FROM THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE TO ACCOMPANY H. R. 9861, HOUSE OF REPRESENTATIVES, 73RD CONGRESS, SECOND SESSION, REPORT NO. 1944.

ANALYSIS OF THE BILL

(Section 2)

1. The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect.

2. It provides that the employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers' officers with the exercise of said rights.

3. While providing that labor unions shall be free from employer influence and control, it does not give preference to any particular union or class of unions.

4. Machinery is provided for the taking of a secret ballot to enable the Board of Mediation to determine what representatives the employees desire to have negotiate for them with the managements of the carriers in matters affecting their wages and working conditions.

5. It forbids the use of the carriers' funds to maintain, aid, or control the labor organizations of the employees and specifically prohibits carrier managements from requiring employees to sign "yellow-dog contracts" requiring them to join company unions.

6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect.

RESPONDENT'S BRIEF

FILE COPY

JAN
CHARLES

IN THE

Supreme Court of the United States

October Term, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY,

Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS

FRANK L. MULHOLLAND,
1441-49 Nicholas Bldg., Toledo, Ohio,
CLARENCE M. MULHOLLAND,
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S. M. BRANDT,
Seaboard Bank Bldg., Norfolk, Va.,
WILLARD H. MCEWEN,
1441 Nicholas Bldg., Toledo, Ohio,
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WILLARD H. MCEWEN,
1441 Nicholas Bldg., Toledo, Ohio,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY,

Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

BASIS OF THE ACTION

This case comes before this court on a writ of *certiorari* to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit (84 Fed. 2d 641, R. 311), affirming a decision of the District Court of the

United States for the Eastern District of Virginia (11 Fed. Supp. 621, R. 254). This case is an action in equity, arising under the Railway Labor Act, a statute of the United States originally enacted in 1926 and amended in 1934. The interpretation, application, and constitutional validity of this statute have been called in question by the petitioner. A further question has been raised as to the relation between the provisions of this act and those of another federal statute, the Norris LaGuardia, or Anti Injunction, Act. (Relevant portions of both the above statutes will be found in Appendices I and II, respectively, to this brief.)

THE PARTIES

The parties to this proceeding are the Virginian Railway Company, petitioner, and System Federation No. 40 of the Railway Employees' Department of the American Federation of Labor, (hereinaffer referred to as the "Federation") and certain individual officers of the Federation, respondents.

THE FACTS

The facts out of which this action grew are as follows:

Prior to July 1, 1922, those employees of the Virginian Railway Company working in its shops (Mechanical Department employees) were represented by the Federation for the purposes of collective bargaining. On that day a strike was called among the said employees. This strike was unsuccessful, and the strikers were largely replaced by men newly hired for that purpose.

On July 3, 1922, the United States Railroad Labor Board, a tribunal organized pursuant to the provisions of the Transportation Act of 1920, adopted a resolution calling upon employees of carriers to organize themselves into associations for the purpose of collective bargaining. In purported compliance with this resolution, the petitioner caused to be formed among its Mechanical Department employees an organization known as the Mechanical Department Association of the Virginian Railway (hereinafter referred to as the "Association"). With regard to this Association, the District Court in its opinion commented as follows:

> "With respect to the formation and activities of this Association the testimony reveals that no employee knew just how or when he became a member thereof, that no dues were ever assessed or paid by members, that meetings were held only once every two years and then apparently for the sole purpose of electing officers and committeemen, that the notices of the elections were sent out from an office of the railway, that all expense incident to the organization and maintenance of the Association was defrayed by the Railway, and that no substantial grievances were ever taken up by the Association representatives with the Railway." (R. 256).

This conclusion was amply supported by the testimony given at the trial. No less than ten witnesses testified as to the lack of formal membership applications, meetings, and dues in this organization (R. 81, 103, 104, 105, 110, 118, 122, 129, 131, 133, 174). The carrier printed the ballots used in the biennial elections of the Association (R. 81, 112), supplied meeting places where these elections could be held (R. 104) and sent out notices rela-

tive to association affairs through the company mail (R. 104, 112), all at its own expense. In addition it supplied cash to the Association to the extent of $100.00 per year (R. 105). As an instrumentality for representing employees in the adjustment of their grievances, the Association was entirely ineffective (R. 113). The membership of the Association was maintained largely through the efforts of the carrier, inasmuch as employees working for the railroad were not permitted to affiliate with any other labor organization (R. 89, 105, 127).

The Association continued in existence without opposition until 1927, at which time the Railway Employees' Department of the American Federation of Labor made an effort to organize the mechanical department employees into unions affiliated with itself. This effort continued until the time of the filing of this action. In 1934 the president of the Railway Employees' Department of the American Federation of Labor claimed the right to represent the mechanical department employees by the choice of a majority of them. The claim so made by him was disputed by the Association and by the carrier. Accordingly the services of the Board of Mediation, as organized under the Railway Labor Act of 1926, were invoked in an attempt to settle this dispute. The investigations of this board developed the fact that the Federation had secured signed authorizations from a substantial number of the employees affected, but not from a majority. No further investigations were made by this board and the dispute remained in *status quo* until after the passage of certain amendments to the Railway Labor Act on June 21, 1934. Shortly after that date the matter was referred to the new National Mediation Board, organized

pursuant to the amended act. Section 2, paragraph ninth,[1] of this act was invoked.

The National Mediation Board took jurisdiction of this dispute, and decided to hold an election among the mechanical department employees, which was done. The District Court found that "all the testimony on that subject shows that the election was fairly and honestly conducted, and that everyone entitled to vote had full opportunity to exercise that right without hindrance or interference by the Federation or anyone connected with it." The election resulted as follows:

	Eligible	For Federation	For Association
Sheet Metal Workers	52	37	9
Carmen and Coach Cleaners	266	98	20
Machinists	267	141	41
Blacksmiths	46	22	8
Electrical Workers	114	80	11
Boilermakers	79	51	9
Totals	824	429	98

[1] The paragraph in question reads in part as follows:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party in the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * * In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, * * *."

The National Mediation Board, on September 13, 1934, certified System Federation No. 40 as the representative of each of these crafts. (For full copy of the certification by the National Mediation Board, see R. 13 to 15, inclusive.)

During the course of these events, the carrier in many ways exerted its influence upon its mechanical department employees in an effort to interfere with their choice of representatives and coerce them to the end that they would refrain from becoming members of the various unions affiliated with the Federation, or select the Federation as their representative.

> "The court doth further find from the evidence that by means of personal interviews, posted bulletins and by the circulation of a pamphlet calling the attention of its Mechanical Department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendent sought to influence its Mechanical Department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammeled right to choose their own representative; * * *." (R. 281, from the 4th finding of fact of the District Court.)

The pamphlet mentioned was the so-called Sasser statement, issued by the Superintendent of Motive Power of the Virginian Railway (J. W. Sasser), and distributed through the company's foremen and the officers of the Association to the Mechanical Department employees. (R. 69.) This statement was issued on June 11, 1934,

while the representation dispute above mentioned was pending, and while a mediator of the Board of Mediation was on the property of this carrier attempting to adjust the differences between the parties. The complete statement is found on pages 197 to 201 of the Record. The District Court said of it:

> "* * * * I hardly think that any one can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to 'use the authority and power' of the railway 'to induce action' by the members of the craft 'in derogation of what the statute calls "self-organization" '. That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a reasonable inference to be drawn from the situation and power of the author over those to whom it was addressed. * * *"

The personal interviews to which the court referred consisted of statements by foremen of the carrier, advising employees to vote against the Federation if they wished to continue in their employment, and in further statements to the effect that to remain away from the polling places would amount to a vote for the company. (R. 84, 108, 109, 116, and 117.)

The court in reaching the conclusion set up in its fourth finding of fact, carefully weighed this evidence as is shown from the discussion of it in the opinion (R. 264). After the National Mediation Board had issued its certification, certifying the Federation as the representative of the Mechanical Department employees, the carrier refused to recognize it or to treat with the Federation as such representative. Instead it "by and through its officers, agents and servants, undertook by means of the

circulation of a petition or petitions addressed to the National Mediation Board, to have the certification of the National Mediation Board aforesaid altered, changed or revoked so as to deprive its Mechanical Department employees of the right to representation by said System Federation No. 40, Railway Employees' Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual mechanical department employees by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employees' Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employees." (R. 281, from 4th finding of fact of the District Court.)

This Independent Shop Crafts Association (referred to herein as the Independent) was ostensibly formed by H. C. Hearne, an employee of the carrier. The story of its organization appears in the cross examination of Hearne, who was a witness in the court below. (Pages 169 to 175 of the Record.)

The court analyzed this testimony in the opinion and stated the following as its conclusion:

> " * * * The indications from his action and testimony are strongly to the effect that Hearne in organizing the Independent was not in good faith representing the crafts but was in fact acting at the behest of the railway. And upon the whole case the evidence indicates unmistakably that the real contestants in the election were the Federation

and the Railway, that such is the situation in the controversy involved in this litigation, and that the parts played by the Association and the Independent in those contests have been very largely that of mere figureheads." (R. 265, 266.)

Upon the failure of the carrier to recognize the certification of the National Mediation Board and to treat with the Federation, and upon its persisting in its long-time policy of building up a company-controlled labor organization among its Mechanical Department employees, the appellees filed this action in the District Court, seeking injunctive relief in two respects:

FIRST: They sought a prohibitory injunction restraining the carrier from further acts of interference, influence or coercion toward the employees in question. The prayer for this relief was predicated upon Section 2, Third, of the Railway Labor Act.[1]

SECOND: They sought a mandatory injunction compelling the carrier to treat with the Federation as the representative of these employees as required by Section 2, paragraph ninth of this same act, wherein it is provided that "upon receipt of such certification the carrier shall treat with the representative so certified as the repre-

[1] Said section reads as follows:

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

sentative of the craft or class for the purposes of this act."

The relief prayed for was granted in both respects by the lower court. In reaching this result, the District Court, as we have noted, entered into an exhaustive survey of the evidence and made extensive findings as to the facts. In these findings the Circuit Court of Appeals expressly concurred, saying:

> "The judge below heard the case fully and carefully and correctly analyzed the evidence in his opinion reported in 11 Fed. Supp. 621, to which we refer as a sufficient statement of the facts." (R. 313).

And further:

> "A careful study of the evidence convinces us that these findings are amply supported." (R. 314.)

It is the settled rule of this court that where two lower courts have concurred in their judgments as to the facts of a case, the Supreme Court will not disturb their findings unless palpable error or manifest injustice has been done.

Dun vs. Lumberman's Credit Assn., 209 U. S. 20.

Geddes vs. Anaconda Copper Min. Co., 254 U. S. 590.

Charleston, South Carolina, Mining & Mfg. Co. vs. United States, 273 U. S. 220.

Texas & N. O. R. R. Co. vs. Brotherhood, etc., 281 U. S. 548.

Peck Mfg. Co. vs. General Motors Corp, 57 Sup. Ct. Rep. Advance Sheets, p. 1.

As pointed out above, the findings of the lower courts have a substantial basis in the evidence produced at trial. No palpable error or manifest injustice has therefore been done to the petitioner. Accordingly no issue of fact can properly be injected into the proceedings in this case had before this court.

SUMMARY STATEMENT OF ISSUES INVOLVED AND RESPONDENTS' POSITION AS TO EACH

It will be seen from the foregoing statement of facts that the original controversy in this case was one between two groups of the mechanical department employees of the petitioning carrier. The one group desired and still desires to be represented for the purpose of collective bargaining by the respondent Federation. The other group expressed an apparent desire for representation by the now defunct Association, a company formed and dominated figurehead, maintained in existence by acts of influence, interference and coercion on the part of the petitioner.

Into this controversy, which, according to the terms and spirit of the Railway Labor Act of 1926 as well as the amendments of 1934 thereto, was no matter of legitimate concern to it, the petitioner thrust itself in the capacity of an active participant. It raises certain questions in this court concerning the Railway Labor Act:

ISSUE NO. I. Section 2, Ninth, of the act provides that in case of a dispute as to who shall represent any class or craft of employees, the National Mediation Board shall have authority to ascertain the position of the em-

ployees in the matter and certify the same to the carrier. This paragraph further provides that:

> "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." (For the full text of this paragraph see Appendix I, pp. 111-112.)

QUESTION: Does Section 2, Ninth, impose upon a carrier an obligation to "treat" which is enforceable in a court of equity?

RESPONDENTS' POSITION: (a) The legislative history of this statute, the specific evil at which this paragraph was aimed, and the enforceable nature of other provisions of the act all indicate that it was the intent of Congress to make Section 2, Ninth, enforceable by process.

(b) The obligation so imposed is sufficiently definite and concrete as to be susceptible of enforcement by injunction.

ISSUE NO. II. Section 2, Ninth, of the act as above construed and as applied to the negotiation of collective bargaining agreements does not compel any carrier to enter into any agreement with any representative. It does, however, compel it to negotiate with the certified representative and with it only.

QUESTION: Does Section 2, Ninth, therefore, take the liberty of contract of the petitioner without due process of law?

RESPONDENTS' POSITION: Any impairment of the petitioner's liberty resulting from the provisions of this paragraph constitutes a phase of a reasonable regulation of interstate commerce, and hence conforms to the requirement of due process of law.

ISSUE NO. III. The Railway Labor Act applies to all employees of carriers according to the definition of employees made in the orders of the Interstate Commerce Commission. Specifically, as applied to this case, the Act includes within its scope "back shop" employees, or those engaged in making repairs of a permanent nature on the operating equipment of the carrier.

QUESTION: Is the Railway Labor Act as a whole, therefore, a valid exercise of the power of Congress to regulate Interstate Commerce?

RESPONDENTS' POSITION: (a) The congressional power extends to the regulation of all matters which directly interrupt or interfere with the free flow of interstate commerce. The purpose of this act is to prevent such interruptions growing out of disputes between carriers and employees, which interruptions are likely to arise from disputes involving any group of employees whether directly engaged in interstate commerce or not.

(b) The relationships between a carrier and its employees who are directly engaged in interstate commerce and its employees who are not so engaged are so commingled in practice as to render the regulation of the former impracticable unless the regulation of the latter is included.

ISSUE NO. IV. Section 2, paragraph Fourth of the Railway Labor Act contains the following provision:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act."

In case there is a dispute as to who is the representative of any craft or class, the National Mediation Board is authorized to hold an election and determine the matter. (Section 2, Ninth.) The results of the election held in this case are stated on page 5. All of the statistics there noted were recited by the board in its certification except the number of eligible voters in each craft. The board did not recite in terms that the Federation was the choice of a majority, but did certify it as the chosen representative of the crafts in question. The petitioner treats this situation as presenting one issue to the court (petitioner's brief page 15, No. IV). It is submitted that there are two points, factually related but legally distinct, the one involving the interpretation of the act, the other the validity of the certification.

QUESTIONS: (a) *Does the language of Section 2, Fourth, require that a majority of the eligibles in any craft or class of employees must vote in favor of a given representative in order to constitute a valid selection, or is a majority of those voting sufficient?*

(b) *Is it necessary for the National Mediation Board to state in its certification all of the evidence upon which its finding of fact is based, and to state in terms that a majority has voted for a certain representative?*

RESPONDENTS' POSITION: (a) If the provision of Section 2, Fourth, relating to the majority of a craft or class is applicable to elections conducted by the National Mediation Board, this provision contemplates a majority of those voting in a representation election, at least when a majority of the eligible voters participated in the election by casting ballots.

(b) The certification of the National Mediation Board was a complete and proper finding of those facts the determination of which was entrusted to it by the statute. Such a certification need not contain a statement of the evidence upon which that finding is based.

ISSUE NO. V. (This issue is a combined statement of petitioner's Issues Nos. V and VI.) The Norris-LaGuardia Act (for the provisions of which see Appendix II, p. 121) is a statute limiting the power of federal courts to grant injunctions in cases involving labor disputes. Section 4(e) of the Norris-LaGuardia Act provides that an injunction shall not issue to restrain the commission of acts amounting to a "giving of publicity to the existence of, or the facts involved in, any labor dispute * * *." Section 9 provides that "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill * * *." Petitioner asserts that this section prohibits the granting of mandatory injunctions. Sections 6 and 7 provide in effect that no person, association, or organization involved in a labor dispute shall be held liable for the acts of agents, except upon clear proof of participation, authorization or ratification by them.

QUESTION: Is the power of the court to act in this case restricted by the Norris-LaGuardia Act or any of its provisions?

RESPONDENTS' POSITION: (a) General application of the Norris-LaGuardia Act.

1. This Act was intended to apply only to situations involving strikes or lockouts.

2. The means of enforcement contemplated by the Railway Labor Act for rights created by that Act take precedence over any general limitations on the granting of equitable relief set up by the Norris-LaGuardia Act inasmuch as the Railway Labor Act is a subsequently enacted statute.

(b) Application of specific provisions of the Norris-LaGuardia Act.

1. Section 9, properly interpreted, does not forbid all mandatory injunctions in cases involving labor disputes as contended by the petitioner.

2. Section 4(e) is not applicable because the acts of the petitioners cannot properly be considered as the giving of publicity, and because the injunction granted by the District Court is not directed to any act of the petitioner whose object is mere publicity, but only to those acts amounting to influence, interference or coercion.

3. Sections 6 and 7 are not applicable because the petitioner is not an "association or organization" within the meaning of the act, and because the findings of the District Court establish that the petitioner itself performed the unlawful acts which are the basis of the injunction. Authorization or ratification by it, therefore, may be considered as proved.

ARGUMENT

I. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT IMPOSES AN OBLIGATION TO TREAT WHICH IS ENFORCEABLE IN A COURT OF EQUITY.

a. It Was the Intention of Congress That Section 2, Ninth, Should Be Enforceable.

Such portions of Section 2, paragraph Ninth, of the Railway Labor Act as are relevant to this portion of the discussion are reproduced in the footnote below for the convenience of the court.[1]

The question is raised as to whether the obligation to "treat" created by the last sentence in the quoted portion of Section 2, Ninth, is to be interpreted as creating an obligation enforceable by process.

Any statute is an expression of legislative intent. The judicial process of interpretation is a determination of the nature of that intent. In making such determination, courts are not limited to an examination of the specific phrase whose meaning has been called into question,

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[1] "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. *Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.*" (Emphasis ours.) (U. S. C. Title 45, Sec, 152, para. Ninth.)

nor necessarily to the individual statute of which that phrase is a part. As the phrase must be considered in relation to its context, so must the statute be considered in relation to other statutes dealing with the same general subject matter which may have been amended, supplemented, or supplanted by it. In no other way can an accurate appraisement be made of the basic legislative purpose. An understanding of this purpose supplies the plan of the statutory mosaic and gives meaning to its component parts. The Railway Labor Act is the current expression by Congress of such a basic purpose.

It has been the experience of the past that interstate commerce is subject to delays and interruptions which have their source in disputes between carriers and their employees, and which result in losses to both the participants and the members of the public. Congress has sought to minimize or eliminate these losses through a long course of legislation whose basic purpose has been and is to provide the means whereby these labor disputes may be settled before they attain proportions sufficient to jeopardize the carrying on of the commercial process.

The statutory plan throughout this course of legislation has been to encourage the adjustment of disputes in conferences between the parties and to provide for the formation of special tribunals to assist in such adjustments if private negotiations fail.

The various statutes dealing with this matter have naturally not been identical in their details. As one means of carrying out the basic purpose has been found ineffective, another has been substituted, but the purpose itself has not been changed, nor has the general plan for carrying it into effect been fundamentally altered.

This general pattern, running as it does through a whole series of legislative enactments, constitutes a valuable addition to the sources upon which the court is privileged to draw in interpreting any provision of the contemporary statute.

Recent legislative consideration of the problem of the relations between carriers and employees began in 1920 with the enactment of the Transportation Act of that year. It will be remembered that during the World War the carriers of this country were taken over by the federal government for management. The Transportation Act of 1920 was enacted at the time of the termination of federal control when the carriers were being returned to the hands of their respective private managements. Title III of this Act related to labor relations between these carriers and their employees. It contained in the first place a statement of general duties, the carrying out of which would, it was believed, make for amicable relations between the parties.(1) In addition, the statute provided for the formation of a special tribunal known as the United States Railroad Labor Board, whose duty it was

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(1) "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." Transportation Act of 1920, Title III, Section 301; Fed. Stat. Ann., 1920 Supp., pp. 87, 88, 41 Stat. L. 469.

to give consideration to disputes between carriers and employees.

This statute came before this court for interpretation in two cases. Both grew out of the same labor controversy between the Pennsylvania Railroad Company and its shop craft employees. The first case was that of *Pennsylvania Railroad Company vs. United States Railroad Labor Board*, 261 U. S. 72. The action was one seeking to enjoin the board from publishing a decision adverse to the carrier. This court decided that an injunction had been properly refused. It held that the decisions of the board were unenforceable by legal process and hence that their publication was not enjoinable. The court said:

> "It is evident from a review of title III of the Transportation Act of February 28, 1920, that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first, by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing; and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the carrier group, the labor group, and the public.
>
> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed

flow of interstate commerce, and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy, and arouses public criticism of the side thought to be at fault."[1] (pp. 79-80).

The second Pennsylvania case was that of *Pennsylvania System vs. Pennsylvania Railroad Company*, 267 U. S., 203. The question here did not relate to the enforceability of a decision of the Labor Board, but to the enforceability of the general duties prescribed by Section 301 of the Act (see footnote page 19). The plaintiff in the court below had sought to base an action for a mandatory injunction upon an alleged breach of the duties set up in this section. While the question presented to the court was not identical with that involved in the first

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[1]The enforcement provisions of this statute to which the court referred in the above quotation may be found in Section 307, paragraph (c), and in Section 313 of the Act, the relevant portions of which read as follows:

"All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine." (Sec. 307-c, 41 Stat. L. 470.)

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine." (Sec. 313, 41 Stat. L. 473.)

Pennsylvania case, the court considered its ruling in the first case conclusive upon it in the second, and quoted extensively from the opinion there rendered. It was accordingly held that Section 301 of the Transportation Act did not set up any duties enforceable by process. The court so held even though the statute did not make the enforcement provisions which were applicable to decisions of the Labor Board also applicable specifically to the duties prescribed in Section 301. It was concluded that the mere existence of these enforcement provisions, invoking as they did the force of public opinion only as the enforcing medium for one portion of the statute argued that other portions of the same statute were not intended to be enforced by legal process.

The Pennsylvania cases thus establish no general rule of statutory construction to the effect that any duties between carriers and employees set up by any act of Congress are not intended to be legally enforceable. The decisions in both cases are based squarely upon the somewhat unusual enforcement provisions contained in the Transportation Act. The only principle of general application which can be drawn from the opinion is that a court may look to sections of a statute other than the one directly before it in order to determine the legislative intent with regard to the legal enforceability of any obligations imposed. With this proposition we heartily concur. As will be noted later, however, the application of this rule to the Railway Labor Act leads to a conclusion in the matter of legislative intent as to the enforceability of general duties which is diametrically opposed to that reached in the above case.

The Congressional hope that the "economic interest"

of the public would prevent the development of a "serious and widespread labor dispute" was doomed to disappointment. Either the members of the public were apathetic, or the disputants showed less respect than contemplated for public opinion. In any event, the act failed in its purpose, the Railroad Labor Board lost caste, its decisions were openly flouted by employers and employees alike, and in short the whole enforcement machinery of the act broke down.

These facts gave rise to a dangerous situation of which carriers and employees were alike aware. After a series of conferences of the leaders on both sides, it was decided to abandon the Transportation Act entirely, and to request the passage of a new law by Congress. The result was the enactment of the Railway Labor Act of 1926, which was sponsored jointly by the carriers and by the railroad labor unions.

The new statute preserved some of the features of the old, but added a number of new ones. Title III, Section 301, of the Transportation Act was substantially reenacted. The United States Railroad Labor Board, however, was abolished, and there was substituted in its place a tribunal known as the National Board of Mediation, whose function was not to decide but to endeavor to mediate disputes. Minor disputes, relating to grievances or disagreements concerning the application or interpretation of existing agreements between individual carriers and their employees could be submitted to boards of adjustment set up on the properties of carriers or groups of carriers and composed of representatives of employees and carriers in equal numbers. The establishment of such boards, however, was made permissive and not manda-

tory. The act further provided for voluntary arbitration of disputes, the awards of arbiters, however, to be legally enforceable. It provided also for the creation of emergency boards to investigate and report upon serious controversies, and in case such a board was created required the parties to preserve the *status quo* for at least thirty days thereafter. In addition it contained this highly significant provision:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." U. S. C. A. Title 45, Ch. 8, Art. 152, Third. 44 Stat. 577.

This statute was before this oourt for interpretation in the case of *Texas and New Orleans Railroad Company vs. Brotherhood of Railway and Steamship Clerks, etc.*, 281 U. S., 548. It was argued that this provision was not intended to set up an enforceable obligation because the act contained no specific provision for its enforcement. The Pennsylvania cases were cited in support of this contention. This court, however, did not sanction such a position, saying:

> "It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. *This addition cannot be treated as su-*

perfluous or insignificant, or as intended to be without effect. * * *" (Pp. 567, 568.)

"In reaching a conclusion as to the intent of Congress, *the importance of the prohibition in its relation to the plan devised by the act must have appropriate consideration.* Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. * * *" (Pp. 568, 569.)

"*The absence of penalty is not controlling.* The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and *the statutory requirements are susceptible of enforcement by proceedings appropriate to each.* The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. * * *" (Pp. 569, 570.) (Emphasis ours.)

The matters which influenced the court in its decision are apparent from the above excerpts from the opinion. They are:

1. The basic congressional plan of regulation must be considered in interpreting any portion of a statute enacted in furtherance of that plan.

2. Where one statute contains a general statement of duties and a subsequent statute having the same basic purpose adds provisions which can be interpreted as positive commands, the addition cannot have been intended to be without legal effect.

3. The absence of express provisions for penalties is not controlling.

4. The fact that obligations created by sections of a statute other than the one in question are expressly made enforceable is persuasive of the existence of an intention to make all obligations created by it likewise enforceable.

As certain carriers were able to avoid the manifest intention of Congress as expressed in the Transportation Act of 1920, so were certain of them able to avoid compliance with the same general intent as expressed in the Act of 1926. The history of the Virginian Railroad and its relation with its company unions found by the lower court to be mere "figureheads," namely, the Association and later the Independent, is typical of this situation. The method adopted was as follows: A company union was organized and entered into an "agreement" with the carrier. Any claim of any other organization of a right to represent the employees involved was met by a protest from the figurehead union. The carrier then stated that in view of the dispute, it must continue to recognize the company union until the question of representation was settled. Under the Act of 1926 the only recourse of a party was to invoke the services of the National Board of Mediation, as was done in this case. This board, as organized under the 1926 statute, had, it will be remembered, no authority to *decide* the dispute. It could only *mediate*. Mediation cannot be successful where any party enters the proceedings with the fixed determination to yield nothing. Thus the whole matter of representation could be successfully stalemated by a carrier through simply refusing to recognize the claim of any other than its company union to represent its employees.

This situation of stalemate existed on the Virginian Railroad when the amended Railway Labor Act of 1934 was passed.

The existence of this and similar situations was called to the attention of the Congressional committees which investigated the bill prior to its passage.[1]

That the Congress was acting with full recognition of the existing conditions and with intent to remedy them, appears from the report of the House Committee:

> "The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for

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[1] In his testimony before the Committee on Interstate and Foreign Commerce of the House of Representatives, Mr. George M. Harrison, appearing on behalf of twenty-one railroad labor organizations, made the following statement:

> "The law did not go far enough, however, to assure that practice of management designed to defeat the hope expressed by the law would be prevented. And, as a result of that today we have a situation in our industry where a reasonably large number of railway employees have been denied the right to exercise their free choice in the selection of representatives or to have the choice of the employees finally and definitely disclosed.
>
> "So, this bill seeks to supply that deficiency in the Railway Labor Act in respect to that matter and I might best give the general experience, by citing a typical example of that situation today:
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> "The employees on a particular railroad will wish to affiliate with one of the standard railroad labor organizations. After they take membership and authorize the standard organization to represent them, then a formal request is filed with the railway management that the designated organization has been authorized by a majority of the employees involved to represent them in all matters affecting their wages and working conditions. The general reply from management is that 'We have an association on our property with which we have an agreement and we have no information that the employees have changed their minds about representation by that association.'
>
> "And, therefore, they generally decline to meet the rep-

the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, *but it does not provide the machinery necessary to determine who are to be such representatives.* These rights of the employees under the present act are denied by railway managements *by their disputing the authority of the freely chosen representatives of the employees to represent them.* A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. *This bill is designed to correct that defect."* (Emphasis ours).

(The above excerpt from the committee report was quoted by the Circuit Court of Appeals below in its opinion. See R. 320.)

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resentatives of the organization which the employees have subsequently designated to speak for them.

"The next move then is to take that controversy to the United States Board of Mediation and a mediator is generally assigned in an effort to persuade management to recognize the true representatives of the employees. Generally in those proceedings a question comes up as to who shall vote in the election to determine the representatives and, most generally, that question is raised by the opposing association or representatives of management, for one, and only one purpose, of preventing a determination of that issue.

"We have a situation where the men covered by an agreement are the ones that are involved, the management will seek to vote a large number of men that are not covered by the contract and are not involved in the controversy, and as a result of that you get a situation where you cannot progress to a decision in the interest of the employees, because the next move under the present law is a proposal to arbitrate, and that is entirely voluntary, and either side may decline, and generally when they want to maintain the association and prevent the establishment of a standard organization, they decline to arbitrate the controversy, and

Considering the above mentioned three statutes together, the course of historical development is plain. Throughout Congress has been concerned with the possibility that the flow of interstate commerce might be interrupted by labor disputes with resulting injury both to the disputants and to the general public. In its first attempt to remedy this situation, it sought to express general principles relating to the elimination or adjustment of such disputes. It provided the machinery by which their elimination or adjustment could be obtained. Resort to this machinery was by the Transportation Act, made entirely voluntary, and the enforcement of decisions was left to the sense of propriety of the parties, and to an

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as a result the management goes ahead and continues to deal with representatives whom the employees have repudiated and would repudiate through the medium of a secret ballot if they could have that opportunity.

"So, this Act is designed to take care of that situation by providing that, if any controversy arises among the employees as to who are their representatives and that controversy is carried to the Board of Mediation, the Board of Mediation shall investigate that dispute and certify to the parties who are the legally designated representatives; or the Board of Mediation may take a secret ballot of the employees involved, and the Board shall be empowered to decide who shall participate in that ballot; or, if the Board does not desire to assume that duty because of the highly controversial nature of it, the Board may appoint three neutral persons who will decide who shall participate in the hearing, and then, based upon the decision made by the neutrals as to what individuals shall participate in the election, the Board of Mediation then proceeds to conduct the election and certify the results to the parties.

"When that is accomplished, the law makes it the duty of the carrier officers to deal with legally designated representatives of employees in the purpose of making and maintaining agreements." Hrgs. before Comm. on Int. and For. Commerce, 73rd Congress, H. R. 7650, pp. 78, 79.

aroused public opinion. This method of enforcement was found to be entirely inadequate.

The Act of 1926 was not an abandonment of the principles of the prior statute. It was merely a rephrazing of those principles with the addition of such legally enforceable obligations as were considered necessary to make them workable in practice.

The Act of 1934 represents a similar amplification of the Act of 1926. The principles are unchanged. Under the present act, the basic system for the elimination of disputes is still essentially through conferences between the parties. If these conferences are not successful, resort may be had to special tribunals. The specific mandatory or prohibitory features of the act are designed to facilitate the free operation of the whole system and to require that the parties observe certain necessary conditions precedent to its successful operation. The concern of Congress is that employers and employees shall deal together. In so dealing it is imperative that the representatives of the parties truly represent. The Act of 1926 provided that representatives be selected without interference, influence, or coercion of either party over the other. The Act of 1934 provides the means for ascertaining the employees' choice of representatives and compelling the carrier in all its dealings with its employees to treat with the true representative rather than with a mere figurehead. It is not reasonable to suppose that Congress, in an obvious attempt to strengthen the existing statute by specific provisions of compulsion, could have intended that compliance with these new provisions should be left to the voluntary action of the very parties whose refusal to comply with the spirit of the former law

made necessary the enactment of the provisions in question. It cannot have intended that this additional matter should be "treated as superfluous or insignificant" or as "without effect." "The importance of the prohibition in its relation to the plan devised by the act must have appropriate consideration." (*Texas & N. O. R. R. vs. Brotherhood, supra.*[1])

The historical development of the Railway Labor Act of 1934, therefore, is indicative of the intent of Congress to impose an enforceable legal obligation upon carriers to treat with the true representative of any craft or class of their employees certified as such by the National Mediation Board. The petitioner argues, however, that any interpretation of Section 2, Ninth, which construes it as imposing an enforceable obligation is anomalous. It

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[1]This whole matter is admirably summarized in the opinion of the Circuit Court of Appeals as follows:

> "The history of the Railway Labor Act shows that it was the purpose of Congress by the use of this language to impose a binding duty upon the carrier to recognize and treat with the representatives of the employees as certified by the Mediation Board. The Transportation Act of 1920 provided merely that the carriers and their employees should exert every reasonable effort to avoid interruption to the business of the carriers growing out of disputes with their employees, with provision that the parties should endeavor to settle such disputes, and if unable to do so, should refer them for arbitration to the appropriate board. * * *
>
> "The Railway Labor Act of 1926, 44 Stat. 577, created certain definite legal obligations enforceable by judicial proceedings for the purpose, among other things, of safeguarding the rights of the employees to bargain collectively through representatives of their own choosing without interference on the part of the carrier. *Texas & N. O. R. Co. vs. Railway Clerks,* 281 U. S. 548, 569. It did not, however, provide the machinery necessary for determining the representatives of the employees or for requiring the

asserts that carriers are not compelled to treat with representatives of employees where there is no dispute as to who those representatives are, and that accordingly Congress could not have intended to compel a carrier to treat only where a dispute has existed and the true representative determined by action of the National Mediation Board.

This argument is unsound for two reasons. In the first place, if any difference in treatment as between the two situations mentioned above is contemplated by the act, that difference would be entirely reasonable and understandable, and hence not anomalous. In the second place, the petitioner's argument is unsound because no difference in treatment is in fact contemplated by the act.

It must be remembered that Congress amended this statute to remedy a known and existing evil. As we have seen, its attention was specifically called to situations where carriers were avoiding any treating with the true

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carriers to recognize and deal with such representatives; and the Act of June 21, 1934, 48 Stat. 1185, amending the Railway Labor Act, was passed for the purpose of remedying this defect. * * *

"We think it clear that the Act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that 'the carrier shall treat with the representative so certified (by the Mediation Board) as the representative of the craft or class for the purposes of this Act,' it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purposes of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the Act might not be nullified by the carriers refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. * * *" (R. pp. 319, 320, 321.)

representatives of employees through the subterfuge of fomenting and keeping in existence a representation dispute between a company union and the standard labor organization which the employees desired. This method appears to have been the usual procedure. In so far as the evidence presented to the Congressional committee demonstrated, no carrier was then refusing to treat with the true representatives of employees save under the cloak of a claimed representation dispute. Thus if it be true that Congress did not include in the act any compulsory provisions requiring carriers to "treat" where no such dispute existed, no conclusion can be drawn from that fact as to its intention with regard to the enforceability of such an obligation in situations where a dispute did exist. Mere failure to provide for the legal prohibition of possible ills does not disprove an intention to prohibit an existing evil. It is well established in this court that statutes must be construed in relation to the evils which they were designed to cure. (*Warner vs. Goltra,* 293 U. S., 155.)

On the other hand, however, the petitioner's argument is incorrect for the reason that the Railway Labor Act does impose compulsory obligations upon carriers to "treat" in some measure with the representatives of their employees whether a representation dispute exists or not. Petitioner's argument in this connection rests solely on the provisions of paragraphs First and Second of Section 2 of the act.[1]

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[1]"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid

These paragraphs are copied substantially from the Railway Labor Act of 1926, which in turn copied them from Section 301 of the Transportation Act of 1920 (See footnote page 19). As a part of the 1920 Act, this court, in the second Pennsylvania case, decided that this language did not impose an enforceable obligation on the ground that it formed a part of a generally unenforceable statute. As adopted into the Railway Labor Act of 1926, it was also held unenforceable in the case of *Malone vs. Gardner,* 62 Fed. 2d 15, decided by the same United States Circuit Court of Appeals which decided the present case below. The petitioner asserts that this language as used in the Act of 1934 provides an unenforceable obligation under the familiar "copied statute" rule of interpretation. This rule, of course, is not absolute. That language which creates an unenforceable obligation when a part of a generally unenforceable statute retains its character when it becomes a part of an enforceable act is not an inevitable conclusion. However this may be, and regardless of the enforceability or otherwise of the provisions of Section 2, First and Second, there are other provisions of this statute which do create enforceable obligations upon *all carriers* to treat or confer with the representatives of their employees under certain circumstances.

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any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Public Act No. 442, 73rd Congress, U. S. C. Title 45, Section 152.)

It will be noted that Section 2, Ninth, requires carriers to "treat" with the representatives of their employees "for the purposes of this act." We should consider, therefore, what are the purposes of the act, and what compulsion is placed upon *carriers generally* by other portions of the statute in relation to these purposes.

It is apparent that the purpose of any "treating" must be to adjust differences between the parties. The phrase "purposes of this act" accordingly must refer to the settlement of disputes between carriers and employees. Two types of disputes are contemplated by this statute, *i. e.*, those involving the making or changing of agreements concerning rules, rates of pay, or working conditions, and those involving local grievances or disputes concerning the interpretation or application of agreements already made.[1]

The system set up by the statute for all carriers regardless of whether a representation dispute exists or not, contemplates a measure of compulsion in the matter of treating with representatives of employees in the settlement of both types of differences.

For example, all carriers are required to post notices to the effect that all labor disputes of whatever nature

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[1] "Sec. 2. The purposes of the Act are: * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

"will be handled in accordance with the requirements of this act."[1]

Separate lines of procedure are provided by the act for the handling of the two types of disputes above noted. Changes in agreements are to be made in accordance with Section 6. This section clearly contemplates that conferences be held by the parties.[2]

The obligations of this section are made criminally enforceable upon carriers by Section 2, paragraphs Seventh and Tenth.[3]

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[1]"Sec. 2. Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act. * * *"

[2]"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

[3]"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraphs of this section shall be a misdemeanor, * * *."

In view of these specific enforcement provisions, the intention of Congress is clear. The provisions of Section 6 of the act relating to conferences between the parties are certainly enforceable provisions. To this extent unquestionably Congress has imposed a legal obligation upon all carriers to "treat" with employee representatives.

The other type of case, *i. e.*, one arising out of grievances or out of the interpretation or application of agreements, is to be handled in a different manner. The parties, however, are again commanded to confer with regard to the matter. If conferences fail, then the dispute may be referred to the National Railroad Adjustment Board for determination.[1]

Either method of procedure as outlined by the statute

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[1] "Sec. 2. Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *."

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided: * * *

"(i) The disputes between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

results ultimately in the parties coming under definite legal obligations. Decisions of the National Railroad Adjustment Board may be enforced by definitely outlined procedure. Acts of the National Mediation Board are not thus enforceable, but a taking of jurisdiction by that board places the parties under a certain legal duty to maintain the *status quo* until its functions have been performed.

In the second Pennsylvania case, this court indicated that where a system for the settlement of disputes resulted finally in no enforceable obligation, the statement in the statute of general duties to be performed in the course of the adjustment process could not be intended to create a legal obligation. The converse of this statement is equally correct. Where the ultimate end of the statutory process is the undoubted creation of enforceable obligations, general statements of duty are given color by the proceedings to which they are related. Accordingly, there is specifically imposed upon all carriers an obligation to confer or treat with employee representatives "for the purposes of this act," *i. e.*, the adjusting of disputes between them.[1]

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[1] The number and nature of the definitely enforceable obligations created by the amended Railway Labor Act of 1934 were considered by the United States Circuit Court of Appeals in its opinion rendered in the case below:

> "It is true that the Act does not require agreement between the carrier and the representative of its employees; but the whole purpose of the Act is to set up machinery for the settlement of disputes by which disagreements resulting in strikes may be avoided, and it is essential to the working of this machinery that the carrier treat with the representative of the employees as contemplated by the Act. Thus, it is provided by Section 2 (second) thereof (48 Stat. 1187, 45 U.S.C.A. 152 (second)) that all disputes between

These factors give a somewhat different significance to the language of Section 2, paragraphs First and Second from that which they had in the Transportation Act of 1920, or in the Railway Labor Act of 1926. Whether the meaning of these two paragraphs in the present act is the same as it was in the former acts, or different, is im-

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a carrier and its employees shall be considered, and, if possible, decided in conference between representatives designated and authorized to confer. It is provided by Section 2 (sixth) (48 Stat. 1188, 45 U. S. C. A. 152 (sixth)) that, in case of a dispute arising out of grievances or the interpretation or application of agreements, it shall be the duty of the representatives of the carrier and of the employees, within ten days after the receipt of notice of a desire on the part of either party to confer with respect to such dispute, to fix a time and place for a conference. Section 6 (48 Stat. 1197, 45 U. S. C. A. 156) provides that carriers and representatives of employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and shall agree upon the time and place for the beginning of conference between representatives of the parties interested in such intended changes within ten days after the receipt of the notice. Carriers are forbidden to change the rates of pay, rules or working conditions as embodied in agreements without giving the 30-day notice just referred to, except in cases where the agreements themselves provide for the change. 48 Stat. 1188, 45 U. S. C. A. 152 (seventh).

"If the conferences thus provided for do not result in the settlement of disputes, the Act has other provisions for their settlement which require action on the part of the representatives of the parties. Thus, either of the parties, which in the case of the employees means their representatives, may invoke the services of the Mediation Board if a dispute is not adjusted in conference, and there is provision for the preservation of the *status quo* for a thirty-day period in case the Mediation Board shall fail in bringing the parties to agreement or in securing an arbitration of grievances. 48 Stat. 1195, 45 U. S. C. A. 155. In case of agreement to arbitrate, the representative of the employees is to select one of the arbitrators if of a board of three,

material, as the obligation to confer is spelled out completely in other portions of the statute which were not copied from any source, and whose significance is unmistakable.

To summarize, therefore, the legislative history of the Railway Labor Act shows an intention to make the obligations of Section 2, Ninth, enforceable by process. Such a construction does not impute to Congress an anomalous or inconsistent intention. If Congress did intend to deal differently with carriers upon whose properties a representation dispute existed, that intention is entirely consistent with the practical differences existing between such cases and others where no dispute existed. We do not, however, concede that there is no enforceable obligation to treat placed upon other carriers and, as pointed out above, that there is such an obligation is definitely stated in connection with the procedure outlined by the act for all the purposes of the act.

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or two if of a board of six; and such representative is to sign the agreement to arbitrate in behalf of the employees. 44 Stat. 582 and 584, 48 Stat. 1197, 45 U. S. C. A. 157 and 158. Questions submitted to arbitration are to be withdrawn upon notice in writing signed by the representatives of the parties. 44 Stat. 584, 45 U. S. C. A. 158(f). And the entire submission to arbitration may be revoked by agreement signed by their representatives. 44 Stat. 585, 45 U. S. C. A. 158. An award of a board of arbitration constituted under the Act is to be filed in the office of the clerk of the Federal District Court; and, unless the award is impeached as provided in the Act, the court is required to enter judgment thereon which shall be final and binding on the parties. 44 Stat. 585, 45 U. S. C. A. 159.

"It is clear that all of these provisions, so carefully made for the settlement of disputes which might lead to strikes and industrial warfare, would amount to nothing if the carrier should refuse to recognize or treat with the representatives of its employees * * *." (R. 318, 319.)

b. The Obligation to "Treat" Imposed by Section 2, Ninth, Is Sufficiently Definite To Be Capable of Enforcement by Injunction.

The petitioner argues that this obligation is imperfect in that it is beyond the power of equity to enforce. To "treat," it says, implies negotiation in good faith, and good faith is a state of mind. This is true. But courts are frequently called upon in many types of cases to pass upon the good faith of a party and to estimate his state of mind by his acts. There are no doubt many instances in which bad faith has been successfully concealed. That such may be the case has never been accepted as a valid reason why courts should be barred from inquiring into the facts and from seeking to enforce the law. The difficulty, if any, is one of proof and not of equity jurisdiction.

Furthermore, this argument of the petitioner is based purely on the positive aspects of the statute and the decree of the District Court, and ignores its negative aspects. It must be kept in mind that the carrier was not only ordered to treat with the Federation as the representative of the employees in question, but as a necessary corollary was also ordered *not* to treat with any other person or organization claiming to be such representative. Not only is the negative phase of this decree definitely enforceable, but it also assists in the enforcement of the positive phase. This assistance grows out of the economic relations of the parties. In dealing with numerous employees scattered over the many miles of territory through which a railroad system extends, it has been considered necessary by carriers that they negotiate gen-

eral agreements defining the rights of whole classes or crafts of employees as units. If the carrier is prevented from treating with regard to the negotiation of such agreements with other parties, its own economic self-interest dictates that it treat for that purpose with the certified representative of the employees, and in good faith. The petitioner's argument in this connection is but an elaboration of the homely saying "You may lead a horse to water, but you can't make him drink." Our answer is, prevent the horse from drinking elsewhere and his own thirst will exert the necessary compulsion. If he persists in his refusal, there is still no adequate reason why he should not at least be led to the water.

The Railway Labor Act establishes the course to be pursued by the parties in settling their differences, and provides for a contact between them for that purpose. It forbids any other course, or any other contact. If the interests of both are to be served, the statutory method must be pursued by them.

The decree of the District Court considered as a whole, does not present insuperable difficulties in the matter of its enforcement. The statute outlines no task for the courts of equity more burdensome than others in the carrying out of which these courts now grant injunctions without question.

In summary, therefore:

1. The intention of Congress as shown by the legislative history and all of the provisions of the Railway Labor Act of 1934 was to place an obligation upon carriers to treat with the certified representatives of employees which would be enforceable by process; and

2. That obligation does not impose a burden of enforcement upon the courts which is beyond the possibility of performance.

II. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT AS ABOVE INTERPRETED DOES NOT VIOLATE THE FIFTH AMENDMENT.

It is elementary, of course, that this amendment establishes the extent to which certain individual rights (notably those of property and freedom of contract) will be protected from encroachment on the part of the federal government. The temptation in assailing the constitutionality of any statute under this amendment is to assert the existence of individual rights, point out in what manner the statute limits or eliminates them, and come to the easy conclusion that the unconstitutionality of the law has been established. The petitioner in this case has yielded to this temptation. It has asserted in itself a right of freedom of contract, to treat with whom it chooses, or to refrain from so treating. It has shown that this asserted right is limited by the Railway Labor Act, and now submits to the court the conclusion that the act is void.

Such an argument disregards one important consideration. The amendment by its terms prohibits only a taking of liberty or property when the taking is accomplished without due process of law. The guarantee is, therefore, not an absolute guarantee of absolute rights. This has been decided many times by this court with regard to the very claim of freedom of contract advanced by the appellant.

"It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Atlantic Coastline Ry. Co. vs. Riverside Mills, 219 U. S. 186.

"The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose."

Liberty Warehouse Co. vs. Burley, etc., 276 U. S. 71.

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments. * * * It is also well established by the decisions of this court that such liberty is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created. * * *"

Highland vs. Russell Car & Snow Plow Company, 279 U. S. 253.

In the case of *Packer Corporation vs. Utah*, 285 U. S. 104, the court had under consideration a statute of the State of Utah making it illegal to display on billboards any advertisement of tobacco or tobacco products. The Packer Corporation had at the time the statute was put into effect, a contract providing for such advertising, and contended that the effect of the statute was to impair the obligation of its contract. The court said:

> "The defendant contends that to make it illegal to carry out the contract under which the advertisement was displayed takes its property without due process of law because it arbitrarily curtails liberty of contract. The contention is without merit. The law deals confessedly with a subject within the scope of the police power. No facts are brought to our attention which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate."

See also:

Duncan vs. State of Missouri, 152 U. S. 377.
Wagner vs. Leser, 239 U. S. 207.
Chicago, R. I. & Pac. R. R. Co. vs. U. S., 284 U. S. 79.

We must conclude, therefore, that not every statute which regulates the individual's contract rights, or even deprives him of them, comes within the prohibitions made by the Constitution. If the statute has a "*reasonable* relation to a proper purpose" (*Liberty Warehouse Co. vs. Burley, etc., supra*), is "*reasonably* necessary to effect any of the great purposes for which the national government was created" (*Highland vs. Russell Car, etc. Co., supra*), and is not "*inappropriate*" to remedy "the

evil aimed at" (*Packer Corp. vs. Utah, supra*), the statute must be held valid whether contracts or contract rights are affected or not.

Thus it is not sufficient in order to come within the protection of the 5th Amendment that parties should show merely the existence of a right to make a contract, together with a statute which, if enforced, would cut off this right. They must further show that the statute in question, which presumably purports to make restrictions in the interest of the public, is inappropriate to the end sought, and is not one reasonably designed to accomplish its stated purpose.

The cases above cited reveal the superficial nature of the petitioner's argument, and further indicate the extent of the analysis necessary to be made in order to establish the constitutionality of this statute. In such an analysis *we must assure ourselves of the exact nature of the Congressional plan. We must know the exact rights, if any, of which any person is deprived. If we find that there has been such a deprivation, we must consider it in relation to the plan of the statute and the evils sought to be remedied in order to determine whether it is reasonable.*

The general nature of the Congressional plan has already been discussed. We have seen that in essence it consists in fostering collective bargaining between carriers and employees, the bargaining process to be supplemented, if necessary, by the findings of special tribunals when the parties have been unable to agree.

In seeking to apply the principle of collective bargaining to a specific industry, the Congress was faced with the necessity of defining its operation. We do not

understand that the petitioner is challenging the principle of collective bargaining as being unreasonable or arbitrary or outside the power of Congress to establish. It is in the specific applications of the principle that the petitioner purports to find an unconstitutional interference with its contract rights.

Accordingly we must inquire as to what these practical applications are as set up in the Railway Labor Act. It is apparent that collective bargaining connotes group action. Congress, in the exercise of its legislative discretion, deemed it necessary to the successful functioning of its plan to define the nature of the employees' groups through which the contemplated bargaining was to be carried on. In selecting the "craft or class of employees" as such group, Congress was making no arbitrary determination. It was merely recognizing bargaining groups which were already in existence and functioning as such on virtually all of the nation's carriers.

It is further apparent that the craft or class, like any other group of individuals, can act collectively only through representatives selected by it. The next step logically, therefore, was for Congress to establish the means by which such representatives should be chosen. In the earlier Act of 1926 it had already provided that they should be selected without influence, interference or coercion on the part of the carrier, which provision had been held valid and constitutional in the *Texas & New Orleans* case. We have already noted certain practices of certain carriers whose effect had been to prevent the making of a choice of representatives by employees, or what amounts to the same thing, to cause an apparent choice of representatives to be made which would not

represent the true wishes of the craft or class in question. Thus it was not only logical, but necessary, in order to perfect the existing system that Congress establish a method of choosing the necessary representatives. It was accordingly provided that the matter should be determined by consulting the wishes of the majority; that the representatives chosen by the majority should act for the whole bargaining group, and that the carrier should treat exclusively with the representatives so chosen in all matters affecting that group.

From the foregoing discussion it is apparent that the petitioner is first placed under the duty of treating with the representatives of a craft or class selected by the majority, and second, is under the further duty of treating with no one else as the representative of this craft or class, or any group within it. The petitioner argues that these provisions constitute restrictions upon its liberty of contract in two respects: First, it asserts a constitutional right to refuse to treat with representatives selected by the majority (and *a fortiori* with any representative of employees however selected), and second, a further right not to be limited to treating with those selected by the majority, but to treat for the purposes of the act with as many representatives of a craft or class as it desires.

The answer to the first contention is apparent. The Railway Labor Act does not require a carrier to enter into any contract, but merely that it shall negotiate with regard to the matter. The petitioner seeks to evade this argument by saying that the contractural process is indivisible and that it cannot be constitutionally compelled

to even approach the contractural threshold, whether it be compelled to enter or not. This contention loses sight of the nature of the Fifth Amendment to the Constitution, and of the obvious meaning of the phrase liberty of contract. A contract is merely a set of rights and duties arising from agreement. Liberty of contract thus connotes freedom to acquire rights or to engage to perform duties. Where a statute leaves to a person the same freedom in this regard which he enjoyed before its enactment, his liberty of contract has not been impaired. The Railway Labor Act compels a carrier to negotiate. Negotiations are not contracts, and in and of themselves cannot have the effect of bringing into existence contractural rights or duties. The claimed right of freedom to abstain from negotiations, therefore, is one whose existence or non-existence can have no legal or practical effect upon the rights of the petitioner. The purpose of the Fifth Amendment was to provide a protection for valuable individual rights. Until valuable rights are infringed, protection of the Amendment cannot be invoked.

The next assertion of Constitutional right by the petitioner is that it should be free to treat with any representatives of any group of employees if it so chooses. The significance of this claim of right is that the carrier, not the Congress, should have the power to determine the nature of the collective bargaining group of employees, and should be able to deal with groups smaller in size than the craft or class, *i. e.*, disgruntled or favored minorities within the craft or class. As a practical matter, this asserted right is one of mere academic value to the petitioner except as it may be used for the purpose of avoiding or breaking down the regulatory scheme exemplified

by the Railway Labor Act, a result which would certainly follow its successful assertion.

In the negotiation of labor agreements affecting large groups of employees, definitely indentifiable as classes or crafts, it is essential that there be but one accredited representative to negotiate such agreements for each class or craft. The records of the United States Railroad Labor Board, the United States Board of Mediation and the National Mediation Board, fail to disclose a single instance where more than one labor agreement with a carrier has ever been negotiated with any class or craft of employees. This has not occurred by chance. The nature of labor agreements is such that no other course is feasible. If one considers the matters covered by these agreements and the manner in which the rules of the agreement become interlocked in practice, it is obvious that there can be only one schedule or working agreement for the entire class or craft, the provisions of which may not be departed from at the behest of an individual or of representatives of minority groups.

Railroad labor agreements establish the rates of pay, hours of work, rights affecting promotion, demotion and furlough, as well as the additional compensation due for extra services rendered and for overtime. By virtue of the practice long recognized in the railroad industry, labor agreements so negotiated by an accredited representative selected by the majority of the class or craft, have been made applicable to all the employees constituting the class or craft. Any departure from this arrangement in the nature of another agreement applicable only to the individuals constituting a minority group

would inevitably become subversive of the agreement made by the representative of the majority group.

The labor agreements covering rates of pay, rules and working conditions, with which the Railway Labor Act is concerned, are to be distinguished from the individual contracts of employment with each employee. They are the general rules and regulations promulgated by the employer for the government of all employees of a particular class; but instead of the employer arbitrarily issuing such rules without consulting the employees, they are formulated in joint conferences and adopted by mutual agreement.

Assume that the agreement negotiated by the representative of the majority of the machinists' craft of the employees on a given railroad provides that any man who has served an apprenticeship, or has had four years' experience at his trade, and who, by his skill and experience is qualified and capable of performing work generally recognized as that of his craft, shall constitute a machinist; that the rate of pay for specified work is $8.00 per day; that the rate shall be higher if inspectional or other duties are added; that the measure of a day's work is determined by a specified number of hours beyond which punitive rates are applicable; that all the machinists in the shops, engine houses, and repair tracks at each center of employment shall be governed by a common seniority roster and that none but machinists shall do machinists' work as defined. If the carrier recognized more than one representative, to negotiate additional agreements providing standards other than those fixed through negotiation with the representative of the majority group, the

very purpose for which the Railway Labor Act was enacted would fail utterly of realization.

To reiterate, the purpose of the Railway Labor Act is to aid and encourage the railroads and their employees to make and maintain agreements to the end that labor strife and discontent be allayed and labor harmony and good morale prevail; all to the end that there be no interruption of commerce in the public interest. To this end the employees are not only safeguarded by the Act in how they may associate themselves for purposes of selecting representatives to negotiate agreements, but the Act goes further (also in keeping with its basic purpose) and provides an orderly process whereby disputes among employees as to representation may be peacefully settled.

It should not be difficult to see how this purpose would immediately come into jeopardy if the door is open to representatives of minority groups after the labor standards of a given class or craft have been established by agreement with the representatives selected by the majority. The mere fact that a representative designated by the minority may later apply for a separate agreement to cover his constituency injects a disturbing factor into the process laid down by the Act for expediting the otherwise difficult task of establishing jointly accepted labor standards. The presumption is that the minority would not desire a separate agreement unless it wanted something different or better than the majority. The moment the carrier went so far as even to entertain negotiations with a representative of a minority, the very purpose for which the majority agreement was made, namely, to settle a dispute, would be undermined. In its stead the labor unrest previously allayed by agreement

with the representatives of the majority would again begin to develop and grow at an accelerated pace as the negotiations with the minority proceeded. And if these negotiations were to culminate in an agreement, the old issues, adjusted by the representatives selected by the majority, would again come back to life but with renewed vitality. For the majority would then find itself in an anomalous position no matter what the nature of the agreement with the minority representative would amount to, *i. e.*, whether incorporating standards higher than the agreement with the representative of the majority, or lower. In either event, dissatisfaction or apprehension would again plague the labor force and the carrier would be faced with a new dispute. And any such new dispute could only be settled by agreement of the majority of the employees.

Nor is this the only side of the question. From a simple railroad operating standpoint, it would be quite impractical for two groups, majority and minority of the same class or craft or employees, jointly constituting one operating or service organization, to function efficiently under two divergent sets of labor rules. It would be just as practical to expect that the operating organization would function efficiently under two divergent sets of operating rules—and labor rules in many respects are operating rules.

Still other complications would arise to defeat the purposes of the Railway Labor Act if minorities were to be enabled or encouraged to make separate agreements transcending agreements made by the accredited representatives selected by the majority. More than one agreement applying to the same class or craft of employees

would make it necessary at the outset to identify the very individuals to whom the terms of each agreement applied. Thus the individuals constituting the majority group and those constituting the minority group would have to be listed for payroll and other accounting needs. The accounting complications arising in themselves would be expensive. The majority and minority employees would become known with the result, considering the controversial nature of the situation as a whole, that all kinds of disturbances growing out of proselyting and favoritism would ensue to impair the morale of the labor forces. How serious such a situation can become needs no elaboration when the struggle among the employees of industry generally over the right to represent and over the right to perform certain classes of work are visualized. The right of the minority to make separate agreements would place a premium on the generation of a host of just such disputes. This would not be consonant with the purposes of the Railway Labor Act.

And what about employees who come into service after two or more sets of agreements have been negotiated? Under what conditions are they to work, and what kind of machinery would have to be set up to enable them to make their selection? Under what conditions is the employee to work who elects neither the standards of the majority nor the minority group? May he make still another agreement? If so, where is the process to end? Such is the situation which the Railway Labor Act and prior railway labor legislation sought to correct.

Collective bargaining has been recognized by this Court as legitimate and salutary. Its fostering and protection on the nation's carriers as a means of settling

disputes between them and their employees has been recognized as a legitimate congressional function. In the case of *Texas & New Orleans R. R. Co. vs. Brotherhood, supra,* this court said:

> "The legality of collective action on the part of of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries vs.Tri-City Cent. Trades Council,* 257 U. S. 184, 209, 66 L. Ed. 189, 199, 27 A. L. R. 360, 42 Sup. Ct. Rep. 72. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice." (p. 570.)

If a carrier may not be compelled at least to treat with representatives selected by a majority of a craft or class of its employees, if it may without limit treat with any favored minority, collective bargaining must inevitably fail, and the plan of the Railway Labor Act to provide for the amicable adjustment of disputes will be nullified. If Congress had authority in the first instance to "safeguard" the right of collective bargaining and make it an "instrument of peace," further enactments serving the same end, only more specifically, are neither arbitrary nor unreasonable.

Finally we call to the Court's attention the fact that the petitioner is a common carrier, a public utility, the operator of a business peculiarly charged with the public

interest. Its business may, therefore, be regulated to a greater extend than is the case with other industries without infringing upon the constitutional guarantee of freedon of contract. (*Wilson vs. New*, 243 U. S. 332.)[1]

The petitioner asserts in its brief that the constitutional right of liberty of contract "includes liberty to refuse to have business relations to any extent." (Brief p. 32.) Yet no carrier would today insist upon a constitutional right to refuse to have business relations with a shipper presenting merchandise for transport, and tendering the regular charge. Statutory regulations have been upheld as constitutional which prevent carriers from even offering to contract with shippers other than on the basis of rates reasonably fixed by governmental authority. Privileges and rebates to individuals or localities have been prohibited, although established by contract. Carriers may not by contract grant passes to other than prescribed classes or persons. (*L. & N. Ry. Co. vs. Mottley*, 219 U. S. 467.) In many other respects, the private rights of carriers to enter into contracts have been subjected to unique restrictions conforming to the importance of the services which they perform for the public and the liability of the public to harm if that

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[1] In the above cited case, this court said:

"That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power, as to leave no room for question on the subject." (P. 347.)

service is not constantly and justly rendered, all without violation of the Fifth Amendment. That the public is vitally concerned in labor disputes involving carriers and employees is obvious. (The extent of that concern will be considered more appropriately in the section of this brief devoted to the Interstate Commerce power.) The Railway Labor Act is designed to safeguard this public interest. Other statutes dealing with other phases of that interest have been sustained as constitutional, although they have definitely compelled carriers to contract or refrain from contracting, or have definitely fixed the terms upon which the contracts might be made. This statute is more mild. It merely compels the carrier to *negotiate* or *refrain from negotiating* with certain representatives of employees to the end that industrial peace and the continuity of commerce be maintained.

From the point of view, therefore, of the *intrinsic worth to the petitioner of the private rights asserted, the result of their assertion upon the success or failure of the congressional plan of regulation and the nature of the business regulated,* Section 2, Ninth, of the Railway Labor Act appears in the light of a reasonable regulation, and hence valid under the Fifth Amendment.

Nor is this conclusion in any way contrary to that reached by this court in the case of *Carter vs. Carter Coal Co.,* 298 U. S. 238. It will be remembered that the Guffey Act which was involved in the *Carter* case provided that when the producers of a certain percentage of the coal tonnage and a stated percentage of mine workers had, by separate or joint contracts, agreed upon a given standard of wages, that standard immediately became

binding upon all other producers and employees in a given area.[1]

The Railway Labor Act on the other hand gives to the representatives chosen by a majority of a single craft or class of employees who are working for a single employer, the exclusive right to negotiate with that employer. If a contract is made between the carrier and these representatives, it must be applicable to the minority group, but they are bound only when such a contract is actually entered into.

It is true that both statutes employ the term "majority." Here, however, their similarity ceases. The differences between them are marked and fundamental. These differences relate to both the abstract legal consequences of the two acts and to their practical operation. They may be summarized as differences, first, in the collective

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[1] Part 3, Section 808(g):

"Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts. (Aug. 30, 1935, c. 824, Art. 4, 49 Stat. 994 to 1002.)"

unit set up, second in the rights reserved to minority groups, third in the rights given to majority groups, fourth, in the nature of the legal results which flow from any action of representatives of the group selected by the majority, and fifth, in the nature of the industry regulated.

The collective bargaining group contemplated by the Railway Labor Act is a single craft or class of employees of a single carrier. It is essentially a *cooperative* group. Economic competition within the group itself is virtually impossible. While the individual members of the craft may in some instances be competing among themselves in the matter of advancement in their employment, this competition is practically eliminated among railroad workers by the widespread acceptance of seniority as the primary requisite for promotion. As between majority and minority groups within a craft, there is no possible economic competition. There may be differences of opinion, but not based upon clashing economic interests. Members of the majority and the minority perform the same type of work. Their economic future is alike bound up with the success or failure of the business enterprises of a single employer. Any act performed by representatives of the craft must be applicable to the craft as a whole. Any act of the representatives so selected which would result in economic harm to the minority would harm the majority as well. Thus the Railway Labor Act sets up bargaining groups in accordance with the community of interest of the parties.

The unit of action under the Guffey Act on the other hand was the "district or group of two or more districts"

and even in some cases the entire industry. Employers and employees alike were considered as a part of the group and bound by group action. The concept of collective bargaining was extended by that statute to include employers as well as employees. Whether or not such extension might be socially desirable in the coal industry, it is unquestioned that it goes beyond the ordinarily accepted significance of the term "collective bargaining." Under the Guffey Act, the likelihood of economic competition between majority and minority groups instead of being remotely possible, was practically certain. Wage standards in profitable mines could be raised in such manner as to force less profitable operations out of existence. The Guffey Act, therefore, contemplated bargaining groups within which there was no necessary community of interest, and where the power of the majority could be used to harm minority interests.

The two statutes are further distinguishable on the basis of the rights secured to minorities. Under the Railway Labor Act a minority has a real part in the affairs of the bargaining group. It participates in any election held to select representatives. It may at any time challenge the right of the majority to represent the craft and precipitate a new election. It may advise and counsel; it may check majority groups when extreme measures are proposed. It has the same function to perform as a minority party in the affairs of government. Under the Guffey Act, however, the minority had no such power. No election was provided for over an entire district to select representatives for employers or employees to act for the district. As soon as isolated employers and their

employees in the required numbers agreed upon a wage scale, that scale immediately became binding upon the remainder. No right to protest, to counsel, or to participate in elections was reserved to them.

There is a further distinction between the statutes in question in the matter of the rights which are given to the majority groups. The Railway Labor Act *grants no right to a majority which that majority did not have before the passage of the statute.* On every Class A railroad in the United States prior to 1934, there were in existence collective bargaining agreements negotiated by representatives chosen by the majority of employees of the various crafts or classes. These agreements were as binding upon minority groups as they were upon the majorities. The Guffey Act, however, purported to give to majorities *legal rights which they had never before exercised or possessed.* To the majority of producers and miners was attempted to be given the right to fix wages for other producers and their employees. No contract negotiated prior to the passage of the Guffey Act had ever purported to accomplish such a result and to bind non-conforming persons who were not parties to the agreement through representatives or otherwise.

Furthermore there is a far reaching distinction between the legal consequences of the two statutes. The Guffey Act, it will be remembered, provided that when the requisite percentage of the producers and miners agreed, either by separate or joint agreements, upon a wage scale, that scale became binding upon other producers and miners *by operation of law.* The Railway Labor Act makes no such provision. In this statute Congress has in effect said to carriers and their employees,

"We believe that your differences can best be settled through negotiation between you of collective agreements. We desire that you execute such agreements, but we do not and cannot compel you to do so. We do, however, command that if such an agreement is negotiated by any carrier, it be done with a craft or class of employees as a unit, and through representatives chosen by a majority of that craft or class. Such an agreement must be binding upon and give equal rights and duties to all members of the craft or class, majority and minority alike. Any agreement not conforming to these requirements is contrary to the public policy expressed by this act and will not be tolerated."

If the members of the minority are affected by an agreement negotiated for the whole craft or class by representatives chosen by the majority, that effect grows out of the *terms of the contract* (which may or may not be entered into) not out of the application of the statute.

One of the principal reasons given by the court in holding the Guffey Act void was that it was an unconstitutional delegation of legislative power. This objection can certainly not be raised to the Railway Labor Act. We know of no authority for the proposition that a statute, which prescribes rules for the making of contracts, can be said to be a delegation of legislative authority when a contract is entered into conforming to the requirements of the statute, but by voluntary action of the parties. The Railway Labor Act states *in advance* what a contract must provide if a valid contract is to be made. That effect is one which similar contracts ordinarily had by their own terms prior to the enactment of the statute.

The Guffey Act sought to give to a contract a legal effect not provided by its terms *after the contract was executed.* The holding of this court that the latter statute constituted a delegation of legislative power is, therefore, in no way applicable to the provisions of the Railway Labor Act.

Finally, there is a difference between the two statutes which is found in the nature of the businesses regulated by them. The mining of coal, while no doubt a basic industry, has never been considered as a public utility or as a business charged with the public interest in the same sense in which those concepts have been applied to the business of the carriers. While the constitutional standard of "due process" measured by the reasonableness of regulatory statutes is applicable to both types of business, the courts have not hesitated to sustain regulations of rates, equipment, and service as applied to carriers which have been rejected as to other industries (*Cf. Wolff Packing Co. vs. Court of Industrial Relations,* 262 U. S. 522.)

Thus the decision in the *Carter* case is not binding upon the court in this one because of the vast and fundamental differences between the statutes involved, both as to subject matter and as to their legal consequences. As we have shown above, the private rights of contract which the petitioner in this case asserts are of trifling value, practically considered. The public end sought by the statute is of the utmost importance. That end cannot be served without taking from the petitioner these contract rights which it asserts. Accordingly the statute is reasonable and a proper exercise of the Congressional

function of regulation. There is, therefore, no violation of the Fifth Amendment.[1]

III. THE RAILWAY LABOR ACT IS A VALID EXERCISE OF THE INTERSTATE COMMERCE POWER.

The argument of the petitioner in this regard is principally drawn from certain cases decided by this court in connection with the first and second federal Employers' Liability Acts. The first of these acts was made applicable to all employees of carriers. It was declared unconstitutional in the first *Employers' Liability Cases*, 207 U. S. 463, on the ground, as subsequently stated by the court in the case of *Illinois Central R. R. Co. vs. Behrans*, 233 U. S. 473, 58 L. Ed. 1051, that it "attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee even though his employment had *no connection whatever* with interstate commerce." (Emphasis ours). After the decision in the first Employers'

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[1] The Court of Appeals dismissed summarily the petitioner's contention below that its constitutional rights under the Fifth Amendment had been violated. Following is a quotation from the opinion:

> "We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the *Railway Clerk's* case, Congress has chosen to promote as an instrument of industrial peace." (R. 334.)

Liability cases had been given, the second federal Employers' Liability Act was passed by Congress, limited in its application to employees who at the time of injury were themselves engaged in interstate commerce. The constitutionality of the second act was sustained in *Second Employers' Liability Cases,* 223 U. S. 1. In the application of this act, it became necessary for the court to determine which employees were engaged in interstate commerce. In various decisions based upon this question, this court decided that employees were not so engaged while making repairs upon equipment which had been definitely withdrawn from service for that purpose. The petitioner points out that the Railway Labor Act by its terms is applicable to "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his services) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. * * *" (U. S. C. A. Title 45, Sec. 151, para. Fifth; Sec. 1, para. Fifth, Railway Labor Act.) It is further asserted that this definition includes the so-called "back shop employees" or those engaged in making permanent repairs of the sort above noted. The petitioner thus concludes that the act is unconstitutional because it is applicable to employees who are not themselves directly engaged in interstate commerce.

In order to clarify the issue, it may be said at the outset that the respondents agree that a substantial number of the employees involved in this case are "back shop employees," that they perform permanent repairs as indicated, and that such employees come within the express terms of the statute. Our objection, accordingly,

is not to the facts, but to the legal conclusions sought to be drawn therefrom, conclusions which completely ignore a large body of decisions rendered by this court defining the extent of the power of Congress to regulate interstate commerce.

The consideration of whether a person or thing is directly engaged in or being used in interstate commerce affords at best a sort of rule of thumb method of determining whether he or it comes within the scope of federal regulatory power. If so engaged or used, federal authority may doubtless be applied. If not, the opposite conclusion does not follow. The authority of Congress is not governed by the employment of people or things in interstate commerce, but by the effects upon that commerce of the acts or practices sought to be regulated. Indeed, the authority of Congress has been held to extend to at least two classes of cases where purely intrastate matters are or may be involved. *First, the federal government may exercise its power to prevent direct injury or interruption to the flow of interstate commerce whatever may be the source of that injury or interruption. Second, where the operations of a carrier are such that its interstate and intrastate activities are so inextricably commingled that they cannot be separated for the purposes of regulation, the power of Congress has been held to extend to both.*

(a) Interruptions to Interstate Commerce

The Railway Labor Act proceeds upon the theory that interstate commerce is liable to interruptions growing out of disputes between carriers and their employees. The disastrous results of strikes on interstate railroads

is a matter of common knowledge. The effect of such strikes is not limited to those occurring among employees operating trains. This was demonstrated by the Shopmen's Strike of 1922.[1]

That such effects were felt by the Virginian Railway is demonstrated in its answer filed in the District Court, wherein it alleges that this same strike "so interfered with the operation and movement of trains by defendant *in interstate commerce* that defendant applied for and was granted permanent injunctions by the District Courts of the United States for the Western District of Virginia and for the Southern District of West Virginia, respectively, * * *." (R. 44.) (Emphasis ours.)

If the government of the United States has the power to prevent such interruptions to commerce by injunction after the interruption has begun, it has equal power

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[1] This strike was characterized as follows by the court in the case of *United States vs. Railway Employes' Department*, 290 Fed. 978:

> "The general effect of the strike on the performance and operations of the fifty railroads from which testimony was adduced, was to increase delays of freight, passenger, and mail service approximately 50 per cent. The general effect of the strike on the motive power of the 50 railroads from which proof was furnished was to bring about a general breakdown and deterioration of motive power, resulting in the consumption of such surplus motive power as those railroads had on the 1st of July, 1922, and in the inability on the part of most of those roads to perform any *back shop repairs* during the early months of the strike, and in limiting repairs from then on.
>
> "The general effect of the strike on business and industry of the country, as evidenced by the testimony of 53 representatives of leading business concerns of the country, was a general disturbance, slowing down of production, reduction of volume, loss of customers, and monetary losses due

to eliminate the source of the interruption before it occurs. Through the Railway Labor Act, machinery has been provided whereby disputes between carriers and employees may be adjusted in their early stages by orderly process rather than permit them to grow to the proportions of civil strife, when the national government may be compelled to suppress them by the application of force. Reasoning from past experiences, the Congress concluded that the interruptions which it sought to prevent might arise as easily from disputes involving shop employees as from any other class. Nice distinctions between employees engaged in interstate commerce and those not so engaged, or between back shop employees and others, were not attempted, for the reason that no such distinctions have ever been apparent in the results of the disputes involving these various groups. Whatever the group, the ultimate result of a serious dispute between a carrier and its employees has been the same—interruption to interstate commerce, direct and disastrous. Accordingly Congress sought to apply the procedure set up in the statute to all classes of carriers' employees defined as such by the rulings of the Interstate Commerce Commission. In so doing, Congress was applying no novel constitutional theory, but was treading a path well marked by the past decisions of this court.

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to delays on the part of business houses in receiving and obtaining raw materials, and in shipping and transporting finished products. The effect of the strike on the United States Postal Department, as evidenced by the certificate of the Postmaster General, was the discontinuance of 706 trains carrying United States mail, operating over a total of 39,716 miles. As a result of this, 462 United States post offices, serving a population of 352,671 people were without mail service." (P. 981.) (Emphasis ours.)

In the case of *Southern Railroad Co. vs. United States,* 222 U. S. 20, 56 L. Ed. 72, the court had before it the question of the constitutionality of the Safety Appliance Acts. These acts were not limited to requirements of safety appliances on locomotives and cars used in interstate commerce, but were applicable to all equipment however used. For this reason their constitutionality was attacked in the above case. In the course of its opinion sustaining the laws, the court said, with regard to the power of Congress:

> "* * * its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

See also *Texas & Pac. R. R. Co. vs. Rigsby,* 241 U. S. 33, 60 L. Ed. 874.

In the *Second Employers' Liability Cases,* 223 U. S. 1, the court decided that Congressional power extended to the regulation of rights of action of employees injured while engaged in interstate commerce, although the injuries were caused by the negligence of other employees not so engaged. Not "the source of the injury" said the court, but "its effect upon interstate commerce" is "the criterion of Congressional power."[1]

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[1]The following excerpt from one of the briefs filed was quoted by the court with approval:

> "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appro-

In sustaining the Hours of Service Act as being constitutional in the case of *B. & O. R. R. Co. vs. Interstate Commerce Commission*, 221 U. S. 612, the court said:

> "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. * * * In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers, and other persons embraced within the class defined by the act." (P. 619.)

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priate to save the act of interstate commerce from prevention or interruption, *or to make that act more secure, more reliable, or more efficient.* The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and *about the conditions under which those agents and instruments perform the work of interstate commerce,* whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the *reliability* or *promptness* or *economy* or *security* or *utility* of the interstate commerce act." (Emphasis ours.)

The Adamson Act prescribing the eight-hour day among railroad employees was upheld as constitutional in the case of *Wilson vs. New,* 243 U. S. 332, on the express theory that plenary legislative authority reposed in Congress to protect and preserve interstate commerce.[1]

The doctrine of these earlier cases was used as the foundation of the Transportation Act of 1920. Concerning this statute, which as we have seen was the predecessor of the present Railway Labor Act, this court said, in the *New England Divisions Case,* 261 U. S. 184:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin vs. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range."

And in the *Dayton-Goose Creek Ry. Co. vs. United States,* 263 U. S. 456, 478, this Court said, in sustaining the "recapture" provisions of the Transportation Act of 1920:

> "In both cases (*C. B. & Q. R. R. vs. United States,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184) it was pointed out that the Trans-

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[1] The Hours of Service Act and the Adamson Act are cited as illustrations of legislative trends not because they are in themselves applicable to back shop employees.

portation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. *To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.*" (Emphasis ours.)

The Railway Labor Act in its original form as enacted in 1926, included a definition of the term "employee" identical with that used in the amended act of

1934. If the latter statute is unconstitutional because it includes provisions relating to employees not engaged in interstate commerce, the earlier one must have been unconstitutional also. The Act of 1926, however, was upheld by this Court as valid in the case of *Texas & N. O. R. Co. vs. Brotherhood,* 281 U. S. 548. The same argument appears to have been advanced in that case as is urged by the petitioner here,[1] and was rejected by this Court in these words:

> "We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact

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[1] The nature of this argument appears more specifically in the opinion of the United States Circuit Court of Appeals for the 5th Circuit where that court stated:

> "The provision in question was attacked on the ground that it was beyond the power of Congress to enact it. We think that under the power to regulate interstate commerce it is competent for Congress to make provision for the settlement of disputes between interstate carriers and their employees with reference to rates of wages, rules, and working conditions, to the end of preventing such disputes resulting in the interruption or stopping of the movement in interstate commerce of freight or passengers. *Wilson vs. New,* 243 U. S. 364, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. Certainly a not inappropriate feature of such a provision would be one having a tendency to secure to each of the parties to such a dispute, when an attempt to effect a settlement of the dispute is to be made, the opportunity of selecting a representative not subject to the domination or under influence of the other party, as a settlement could not reasonably be expected to be satisfactory to both the parties and the public where one of the parties to the dispute was not loyally or fairly represented in the transaction which resulted in the settlement. To say the least, we have not been convinced of the invalidity of the provision in question." *Texas & N. O. R. Co. vs. Brotherhood of Ry. & S. S. Clerks,* 33 F .(2d) 13.

'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564, 19 L. Ed. 999, 1001); to adopt measures 'to promote its growth and insure its safety' (*Mobile County vs. Kimball*, 102 U. S. 691, 696, 697, 26 L. Ed. 238, 239, 240); to 'foster, protect, control and restrain' (*Second Employers' Liability Cases* (*Mondou vs. New York, N. H. & H. R. Co.*) 223 U. S. 1, 47, 56 L. Ed. 327, 345, 38 L. R. A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875). Exercising this authority, Congress may facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries vs. Tri-City Cent. Trades Council*, 247 U. S. 184, 209, 66 L. Ed. 189, 199, 27 A. L. R. 360, 42 Sup. Ct. Rep. 72. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." (The opinion of the District Court in the above case may be found in Vol. 24 Fed. 2d, page 426.)

The case of *Texas & N. O. R. Co. vs. Brotherhood* was commented upon in the recently decided case of *Railroad Retirement Board vs. Alton Railroad Company*, 295 U. S. 330, at page 369, as follows:

> "The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation."

In another recent case, that of *Schechter vs. United States*, 295 U. S. 495, this Court again had occasion to define the extent of the regulatory power of Congress as to interstate commerce. We find the following statement of the law on page 554 of the opinion:

> "The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation 'no matter what may be the source of the dangers which threaten it.' *Southern R. Co. vs. United States*, 222 U. S. 20, 27, 56 L. Ed. 72, 75, 32 S. Ct. 2, 3 N.C.C.A. 822. We said in *Second Employers' Liability Cases* (*Mondou vs. New York, N. H. & H. R. Co.*) 233 U. S. 1, 51, 56 L. Ed. 327, 346, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, that it is the 'effect upon interstate commerce,' not 'the source of the injury' which is 'the criterion of congressional power.' We have held that in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in

all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *The Shreveport Case* (*Houston, E. & W. T. R. Co. vs. United States*) 234 U. S. 342, 351, 352, 58 L. Ed. 1341, 1348, 1349, 34 S. Ct. 806; *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 583, 66 L. Ed. 371, 381, 42 S. Ct. 232, 22 A. L. R. 1086. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act, because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Co. vs. United Mine Workers*, 268 U. S. 295, 310, 69 L. Ed. 963, 970, 45 S. Ct. 551; *Bedford Cut Stone Co. vs. Journeymen Stonecutters' Asso.*, 274 U. S. 37, 56, 71 L. Ed. 916, 920, 47 S. Ct. 522, 54 A. L. R. 791."

The law is therefore well settled that the power of Congress to regulate interstate and foreign commerce extends to all matters which directly interrupt or interfere with that commerce or impair the efficiency of the agencies which are engaged in it. The pleadings of the petitioner filed in the court below, the reports of decided cases and past events which are matters of common knowledge, are all eloquent of the fact that labor disputes and disorders may interfere with and disrupt commercial enterprise. These effects have come from disputes involving back shop employees as well as others. The effect and not the source of the injury being the criterion, the existence of Congressional power as a general principle is well established. Finally, however, this Court has sustained the Railway Labor Act of 1926, which according

to its terms applied to exactly the same employees as the present one, on the express ground that Congress might legitimately act to protect interstate commerce from the effect of "disputes which threatened the service of the necessary agencies of interstate transportation." The weight of authority opposing the petitioner's contention in this case is overwhelming.

(b) Co-mingling of Employees Engaged in Interstate Commerce and Others as to Relations With Employing Carriers.

There is another factor closely allied to the above in many respects which is also important in determining the scope of federal power in regulating interstate commerce. Where the functions of a carrier engaged in such commerce are of a sort that its activities, both in interstate commerce and otherwise, are so intimately connected that their separation for the purposes of regulation is impossible, the power of Congress has been held to extend to both.

This argument was used *inter alia* in sustaining the constitutionality of the Safety Appliance Acts. *(Southern Railway Co. vs. United States, supra.)*

The case of *Interstate Commerce Commission vs. Goodrich Transportation Company*, 224 U. S. 194, involved an order of the Interstate Commerce Commission requiring of carriers a uniform system of accounting as to commerce, both interstate and intrastate in nature. It was contended that the constitutional power to regulate interstate commerce had been transcended. The Court rejected this argument, however, saying:

"The learned commerce court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us, with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense,—at least it would seem impracticable to separate it into its items, so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

"We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress; * * " (p. 214.)

In the *Minnesota Rate Cases*, 230 U. S. 352, this principle was further stated as follows:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects com-

> mitted to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the Supremacy of the national power within its appointed sphere."

This rule of law is peculiarly applicable to this case. The difficulty experienced by the courts in determining whether a single employee is engaged in interstate commerce at a single moment of time (in applying the second federal Employers' Liability Act) is attested by the vast number of cases on the point. The decisions both state and federal are hopelessly contradictory, and many situations have been presented to this court for final adjudication. The confusion which would follow any attempt to separate employees for the purpose of regulation of labor relations with their employing carriers would be so great as to render any such plan unworkable. Here we would have involved not a single employee, nor a single moment of time as in the case of an injury, but numbers of employees and long courses of relationships between them and their employer extending over many years. Consider two groups of employees of the same carrier performing similar tasks, *e. g.*, those performed by machinists, the one group making running repairs, the other working in the back shop, the one therefore working in interstate commerce, the other not. Both groups belong to the same craft, usually both belong to the same labor

organization. Their economic interests are virtually identical. Labor unrest may easily spread from one to the other. No practical distinction is maintained between them in the operation of a railroad. Neither group is static. A given employee may be in one category today and the other tomorrow or in any one day he may perform tasks appertaining to both groups.

All this is strikingly illustrated by the situation now existing on the Virginian Railroad. The wages, hours of labor, general working conditions and the classes into which employees are divided in relation to their work, are all set up in an agreement entered into between petitioner and its mechanical department employees at the time ostensibly represented by the Association. (This agreement is Defendants' Exhibit R introduced in the District Court, not all of which was printed in the record. Portions are here referred to by stipulation of counsel on file in this court as approved by the trial judge.) By rule 37 of this agreement, and the appendix thereto, the rates of pay for certain crafts and types of workmen are fixed and made uniform, regardless of whether they are working in a back shop or not. Seniority lists are to be prepared "for each craft and subdivision thereof" (Rule 28-a). Separate lists are not maintained for back shop employees and those making running repairs. A given employee may, therefore, be shifted from the one type of work to the other as his seniority requires. In the training of apprentices (Rule 36-f) the carrier agrees to shift apprentice workmen from one type of employment to another, and even from shop to shop in order that they may become acquainted with "all branches of the trade." In defining

the duties of each craft in this agreement, no distinction is made between back shop and running repairs. (See rule 101 in relation to carmen). Any employee working in the back shop or other permanent location is subject to call at any time to perform road service, emergency, routine, or running repairs relating to his craft. (See rules 8-a, 52, 60, 89, 107.)[1]

In all of this there is no mention of back shop employees as a special group for whom a specialized form of treatment is appropriate or possible. That this carrier has attempted no such division in practice as it says

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[1] *Emergency Road Service.* Rule 8(a). An employe regularly assigned to work at a shop, engine house, repair track, or inspection house, repair track, or inspection point, will be paid from the time ordered to leave home station until his return for all time worked in accordance with the practice at home station and straight time rate for all time waiting or traveling.

Overtime—Regular Assigned Road Work, Hourly Basis. Rule 12(a). Employes regularly assigned to road work whose tour of duty is regular and who leave and return to home station daily (a boarding car to be considered a home station) shall be paid continuous time from the time of leaving the home station to the time they return, whether working, waiting or traveling, exclusive of the meal period, as follows: * * *

Work at Wrecks. Rule 52. In case of wrecks where engines are disabled, machinist and helper, if necessary, shall accompany the wrecker. They will work under the direction of the wreck foreman.

Running Repair Work. Rule 60. Boilermakers who have been working on hot work will not be required to work on cold work until given sufficient time to cool off.

Road Work. Rule 89. Sheet metal workers will be sent out on line of road and to outlying points, when their services are required, but not for small, unimportant running repair jobs.

Repair Work on Road. Rule 107. When necessary to repair cars on the road or away from the shops, carmen, and helper, when necessary, will be sent to perform such work as putting in couplers, draft rods, draft timbers, arch bars, center pins, putting cars on center, truss rods, wheel, and work of similar character.

exists between back shop employees and others, in regulating its own business affairs is the best evidence that such a division is entirely impracticable. According to the petitioner's argument, so long as an employee is engaged in activities which are a part of interstate commerce, he is subject to federal regulations under the Railway Labor Act or some similar statute. His right to collective bargaining, his right to representation for the purpose of collective bargaining, the agreements governing his wages, hours of labor, and working conditions, are matters subject to federal control. As soon as the character of his work changes, his rights change. He is now subject to regulation by the state wherein his services are rendered. He may well find himself working under a different contract, negotiated for him through a different representative. His wages, his hours, his general rights all may vary. It would be impossible for any enforcement agency, or for the carriers or employees themselves, to keep pace with this kaleidoscopic situation. Federal power over a field admittedly within its scope would be effectively nullified. Such is not the purpose of the Constitution.[1]

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[1] This whole situation, both with regard to the power of Congress to legislate in such manner as to prevent interruptions to interstate commerce and with regard to the impracticability of attempting a separation among shop employees according to the character of their duties was admirably summarized by the Circuit Court in the following quotation from its opinion:

> "The purpose of the Railway Labor Act is to prevent the interruption of the business of an interstate carrier resulting from strikes and other industrial disturbances by providing for collective bargaining between such carrier and its employees and the settlement of labor disputes by agreement and arbitration. (47 Stat. 70, 29 U. S. C. A. 102.) For the machinery thus provided to be effective, it

This conclusion is fully in accord with recent decisions of the lower federal courts and of this court with regard to other regulatory statutes of the United States which found their authority in the interstate commerce power of Congress, particularly the cases of *Schechter vs. United States, supra,* and *Carter vs. Carter Coal Company, supra.* This court in those cases was careful to distinguish between the production of such goods as would ultimately be transported in interstate commerce, the handling of those goods after commerce had ceased, and the commercial process itself. Labor disputes in businesses whose function is production or distribution though they might be effective to prevent the goods in question from entering interstate commerce, and by inference though they might so clog the machinery of distribu-

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must apply to all of the employees of an interstate carrier; for not only would it not be practicable to establish separate organizations for bargaining among the employees engaged in interstate commerce as distinguished from those who are not, but disturbances among the latter would inevitably disturb the interstate business of the carrier and would almost necessarily be communicated to the employees engaged in interstate transportation. The defendant, for example, employs machinists engaged strictly in interstate commerce as well as those who are employed in 'back shop' work. It would be out of the question for it to bargain with the former and not with the latter; and, even if this were possible a labor controversy with those involved in 'back shop' work would be communicated to the others and a strike of the 'back shop' workmen, if confined to them, would necessarily interfere with the carrying on of the interstate commerce in which the road is engaged. A typical case is presented, therefore, where Congress must regulate the relationship between the carrier and its employees not engaged directly in interstate transportation, as well as those who are so engaged, to regulate effectively the flow of interstate commerce over which it has plenary power and to prevent interference therewith." (R. 324, 325.)

tion as to ultimately dam up the commercial stream, were considered by the court as affecting interstate commerce only indirectly. These cases establish no rule of law exempting the field of labor relations as such from the scope of federal regulation. They merely define commerce and point out those acts which may be said to directly affect it. The doctrine expressed in the case of *Texas & N. O. R. Co. vs. Brotherhood of Railway and Steamship Clerks* has not been disturbed or modified by these later decisions.

In summary, therefore, both because labor disputes involving employees of interstate carriers generally and back shop employees in particular are likely to interrupt the flow of interstate commerce, and because the relationships of any carrier with its various employee groups are so closely intertwined the one with the other as to make their separation for the purposes of regulation impossible, the federal power in this connection must extend to the regulation of the relations of carriers with all their employees as defined in the act without regard to the nature of the work performed by them.

IV. THE CERTIFICATION OF THE NATIONAL MEDIATION BOARD IS VALID

Section 2—Fourth of the Railway Labor Acts reads in part as follows:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act."

It will be recalled that Section 2, Ninth, authorizes the National Mediation Board to hold a secret ballot or election to determine the choice of any craft or class of employees as to who shall be its representative. The petitioner contends that Section 2, Fourth, provides a rule for the conduct of elections held under Section 2, Ninth. This alleged rule is said to be that a majority of the members of a craft or class who are *eligible to vote* must vote in favor of a certain candidate in order to constitute a valid choice.

On the basis of this contention the petitioner attacks the certification of the National Mediation Board on two grounds, first because in one craft (blacksmiths) the Federation did not receive the votes of a majority of the eligible voters (although a majority of the eligibles voted and a majority of those voting cast ballots in favor of the Federation), and, second, because while as to each craft the board's certification recites the number of employees voting for the Federation and for the Association and certifies that the Federation is the choice of the members of each as their representative, it does not also recite the number of eligibles nor state in terms that a majority of each craft or class desired representation by the Federation.

Two questions are thus presented to the court relating to (a) the proper interpretation of Section 2, Fourth, of the Railway Labor Act in representation elections, and (b) what statements of fact must necessarily be contained in a certification of the National Mediation Board as prerequisites to its validity.

a. Interpretation of the Word "Majority" as Used in Section 2, Fourth, of the Railway Labor Act.

Where a majority vote of any electorate is required to determine an issue, it is the general rule of elections that a majority of those voting is sufficient. Those absenting themselves from the polls are presumed to accept the choice of a majority of the active voters.

> "All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted, unless the legislative will to that effect is clearly expressed." *Carroll County vs. Smith,* 111 U. S. 556.

See also *Cass County vs. Johnson,* 95 U. S. 360, where a statute authorized municipal aid to a railroad corporation only on the assent of "a majority of the legal voters of a township." The court presumed that all qualified voters, who absented themselves from a meeting duly called, assented to the expressed will of a majority of these voting. See also *St. Joseph's Township vs. Rogers,* 16 Wall. 644; *Smith vs. Proctor,* 130 N. Y. 319, 29 N. E. 312; *Louisville & N. R. Co. vs. Davidson County Court,* 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Montgomery County vs. Trimble,* 104 Ky. 629, 47 S. W. 773.

The petitioner's argument in connection with the Railway Labor Act is directly contrary to the foregoing authorities. Instead of the silence of the non-voting member of the craft being presumed to give consent, it is contended that it must be considered as expressing dis-

sent from whatever view is stated by the majority of the voters. It arbitrarily places a statement of opinion in the mouths of those too careless or perhaps too fearful of their employer's displeasure to express an opinion.

Such an interpretation of the term majority would lead to chaos in our political elections. It is particularly vicious in relation to elections held under the Railway Labor Act when we consider the atmosphere of coercion and employer pressure, in which this statute necessarily operates. It is of the essence of Section 2, Ninth, that any election conducted by the National Mediation Board must be secret, in order that it express a free and uncoerced choice. If every non-voter by his mere failure to vote may in effect cast a ballot for an existing company-favored organization, a carrier may easily dominate an election by spreading the word among the employees that it is wise to remain away from the polls if they desire to remain in its good graces. The names of those who do or do not vote are easily ascertainable. If the non-voter therefore, is to be arbitrarily credited with a statement of opinion, the secrecy of the ballot is in large measure lost and its effectiveness as an instrument for determining the free choice of the employees is destroyed. These identical tactics were in fact attempted in this case, for there is evidence in the record (R-116) that an official of the petitioner informed certain employees that to stay away from the polls would indicate that they were "For the company." It does not seem reasonable that Congress should have been to so much pains to provide a free and secret method for choosing representatives and then have further intended to nullify the whole by attaching the meaning to the phrase "majority of a craft or class" for which the petitioner contends.

We are not limited, however, to a consideration of the phrase in question standing alone or in relation to the remainder of the act in order to determine its meaning, for that meaning had been fixed and established long before it was incorporated into this statute. Where statutory language has been substantially adopted from some other source, interpretations of that language made prior to the adoption are available to the courts, not as an absolute or unavoidable rule for determining its meaning, but as an aid to construction. This rule is well established as to borrowed statutes which have received judicial construction in the jurisdiction from which borrowed. It has frequently been applied by this court to statutory provisions which have received an administrative construction and subsequently have been substantially re-enacted. *Brewster vs. Gage,* 280 U. S. 327, *Murphy Oil Company vs. Barnet,* 287 U. S. 299.

This rule of law is based upon common sense. Where language has already received a settled construction, and is enacted or re-enacted as a portion of the statutory law of the jurisdiction, the reasonable presumption is that this was done with the intent to adopt the construction along with the language.

The reason for the rule is applicable to principles formulated by administrative bodies which have been interpreted and applied by them and are subsequently made a portion of the statute law. This is the history of the language under consideration. The principle of majority rule within the craft or class was first announced by the United States Railroad Labor Board as one of sixteen principles stated by the board as a basis for its future action. This statement of principles is set up in Exhibit

B of its decision No. 119 in the case of *International Association of Machinists et al. vs. A. T. & S. F. Ry. et al.*, Vol. II, Decisions of the United States Railroad Labor Board, page 87, at page 96. The language used by the board is as follows:

> "15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

The first sentence of the above quotation is substantially identical with the language of the second sentence of Section 2, paragraph Fourth, of the present Railway Labor Act.

The Railroad Labor Board was called upon to interpret the above quotation from its decision 119 in the case of *Brotherhood of Railway and Steamship Clerks vs. Southern Pacific Lines,* Decision No. 1971, Volume IV, United States Railroad Board Decisions, page 625. In the representation election involved in that case there were 1635 eligible voters and 1181 votes cast. The question was whether a majority of the class or craft meant a majority of the former number or of the latter. The board decided that "majority" meant a majority of those voting, not a majority of the eligibles.[1]

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[1]The following quotation is from the opinion of the Board:

"The carrier understands that principle 15 of Decision No. 119, reading in part as follows:

'The majority of any craft or class of employees shall

This opinion established the settled rule of the board, in the application of its principle No. 15 to representation elections, for all subsequent cases. This rule was applied during the remainder of the board's period of existence, which was between four and five years.

Both the lower courts which considered this case found that the term "majority" should be interpreted as meaning a majority of those voting, not a majority of the eligibles, at least in a case where a majority of the eligibles had participated in the election. The Circuit

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have the right to determine what organization shall represent members of such craft or class * * *,'

requires the carrier to deal with the representatives selected by a majority of any craft or class, and that such representatives must have the authorization of a majority of the employees of the class involved. * * *

"In prescribing a method for justly and fairly ascertaining and determining in cases of disputes the question as to who are 'representatives, designated and authorized,' as provided by the Transportation Act, 1920, to confer and settle disputes, the Railroad Labor Board adopted and prescribed a procedure for holding an election, and in Decisions Nos. 218 and 220 prescribed a method to be observed in conducting such elections by secret ballot so as to secure a fair and true expression of the choice of the employees.

"The board had previously in principle 15 of Decision 119, ruled that 'the majority of any craft or class of employees *shall have the right to determine* what organization shall represent members of such craft or class' in negotiating agreements.

"The purpose of the Railroad Labor Board was to give all the employees to be affected the privilege of expressing their choice. The board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity.

"It was obviously the meaning and the purpose of the board that a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the class."

Court of Appeals stated its opinion on the point as follows:

> "If a majority of the craft participate in an election, the majority of those voting is sufficient. Whether the choice of those voting would also be valid even if a majority of the eligible voters do not participate in the election is a question we need not now decide." (R. 339.)

(For full discussion by the Circuit Court see R. 334 to R. 339, inclusive. For the opinion of the District Court see R. 267.)

These rulings were expressly approved by the Circuit Court of Appeals for the Seventh Circuit in the case of *Association of Clerical Employees, etc., vs. Brotherhood of Railway and Steamship Clerks*, 85 F. (2d) 152. The case before that court was substantially the same on its facts as this one. The court held that the election results should be determined by a majority of the votes cast. Its comment on the opinions below as rendered in this case is as follows:

> "The conclusion was reached that where a majority of those qualified to vote had in fact voted, a proposed representative receiving a majority of the quorum which thus voted was the duly elected representative under the statute. Upon the question of the vote necessary under the amended statute, we are in full accord with the reasoning and conclusion of the opinion of the Fourth C. C. A., as well as that of District Judge Way." (P. 156.)

The purposes of the act, the consequences of giving it the interpretation contended for by the appellant, as well as the construction placed upon this language before it became a part of the statute, all indicate an intent on

the part of Congress that the word "majority" as applied to a representation election should receive its usual and accepted meaning, *i. e.*, a majority of the votes cast. Both on principle and authority, therefore, the decision of the lower courts as to this point should be affirmed.

b. The Certification Stated All Facts and Conclusions of Fact Necessary to Its Validity

The certification of the National Mediation Board (set up in full R. 13 *et seq.*) states fully the result of the election held among the mechanical department employees of the Virginian Railway. The number of votes cast in each craft in favor of each candidate appears on the face of the certification. The total number voting can, of course, be ascertained by a simple process of addition. Further we find in the certification the following general statement:

> "On the basis of this investigation and report, the National Mediation Board hereby certifies that the System Federation No. 40, Railway Employes Department, American Federation of Labor, has been duly designated and authorized to represent the mechanical department employees of the Virginian Railway Company."

The petitioner claims that it does not appear on the face of the certification that a majority of any craft or class voted for the Federation or that such majority participated in the election. We have already shown that the statute does not contemplate that a majority of the whole craft or class must vote for the successful candidate. In any event, in order to demonstrate that a majority participated in the election, or how a majority

voted, the only figures in addition to those already supplied by the board which would be needed to show these facts would be the number of eligible voters in each craft or class. These figures were, as a matter of fact, ascertained by the board, were known to the parties, and were indeed introduced into the record of this case. They were matters peculiarly within the knowledge of the petitioner and were in fact secured by the board in the first instance from the petitioner's own payroll. Their absence *from the certification* is the real basis of the petitioner's objection.

In support of its position in this regard, the petitioner cites such cases as *Panama Refining Company vs. Ryan,* 293 U. S. 388; *United States vs. Chicago, M. St. P. and Pac. R. R. Co.,* 294 U. S. 499, and *Atchison, T. & S. F. R. R. Co. vs. United States,* 295 U. S. 193. These cases state the undeniable rule that where a certain finding of fact by an administrative tribunal is a necessary prerequisite to its making an order, the finding must be stated in the order. The reason for the rule is obvious, and is stated in the above opinions. A reviewing court is entitled to test the order to ascertain whether it is supported by the finding. Without knowing what the finding is, review is, of course, impossible and the order is void.

The analogy between the cited cases and the present one is imperfect. If the Railway Labor Act were so worded that it empowered the National Mediation Board to proceed exactly as at present, with the further provision that having ascertained the name of the representative desired by the employees *it might order the carrier*

to treat with this representative, and if under such a statute the board were to make an order commanding a carrier to treat with a certain party as representative without including a finding that such party was the chosen representative of these employees, then we would have a case coming within the rule stated.

Under the Railway Labor Act, however, the requirement to "treat" is imposed *directly by the statute*. The National Mediation Board is empowered to make *no order* in this respect. Its functions do not extend to the making of orders. It is purely a fact-finding body. The certification of the board in this case is *not an order* at all, but a *finding of fact only*. Thus both the language and the reasoning of the cases cited by the petitioner are entirely inapplicable.

The number of eligible voters in any craft or class of employees, or the number necessary to constitute a majority, were not the ultimate facts with which the board was dealing. At best they were mere matters of evidence going to support the finding of fact which the board would make. It is apparent, therefore, that the petitioner is complaining, not because the board stated no finding of fact, for it did that, but because the board did not also state in its certification *all of the items of evidence upon which that finding was based*. We know of no case, and the petitioner has cited none, supporting a contention that under such circumstances the certification of the board should be held void.

V. THE NORRIS-LaGUARDIA ACT IS NOT APPLICABLE TO THE SITUATION INVOLVED IN THIS CASE.

The Norris-LaGuardia, or Anti-Injunction, Act so-called, is a statute of the United States adopted March 23, 1932 (29 U.S.C.A., Sections 101 to 115, Incl.) This act limits the power of the federal courts to grant injunctions in various types of cases involving labor disputes.[1]

The petitioner has invoked several provisions of this statute which are claimed to be applicable to this case. These sections, it asserts, make the granting of an injunction against it improper under the circumstances.

The first provision invoked is set forth in Section 4 and reads thus:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts. * * *
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; * * *"

It must be noted that petitioner does not contend that the order of the District Court enjoins it from giving publicity to the facts of this or any other labor dispute. It merely asserts that the injunction against influence, interference and coercion which the District Court did

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[1] For the full text of relevant sections of this statute see Appendix II of this brief, page 121.

grant was "bottomed" upon certain acts of the petitioner, which, it is claimed, amounted to a mere giving of publicity (*e. g.*, The Sasser Statement) and that in consequence the injunction is unlawful.

This argument of the petitioner's is faulty in several respects. In the first place it involves a novel interpretation of the word "publicity," which is derived from "public" and normally refers to information disseminated to the members of the public at large. A statement of position prepared by one party to a dispute addressed to *the other parties* and distributed among them cannot be said to be a giving of "publicity" to the facts of a dispute in any proper sense of the term.

Furthermore a reading of the decree of the District Court will reveal that it is "bottomed" not upon mere publicity but upon acts of influence, interference and coercion of which The Sasser Statement was held to be one. There is nothing in the decree of the District Court which expressly or by implication restrains the petitioner from giving *bona fide* publicity to the *facts* of this dispute. It is only when a so-called giving of "publicity" to "facts" amounts actually to a statement of opinions and preferences so phrased and so directed as to interfere with, influence or coerce employees in their choice of representatives that such an act can come within the terms of the injunction.

Surely the Norris-LaGuardia Act did not contemplate that courses of conduct otherwise illegal and enjoinable should become immune from equitable process merely because their doing was attended with publicity.

The petitioner next advances the argument that an injunction against it cannot be predicated upon the unlaw-

ful acts of its agents unless it has expressly authorized or ratified such acts. It bases this contention upon language contained in Sections 6 and 7 of the Norris-LaGuardia Act.

Section 6 provides that "no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." It is at once apparent that this section grants no immunity from injunction to the petitioner, for the petitioner is a business corporation, organized for profit, and cannot be considered as an "association or organization."

Section 7, paragraph (a) of this statute provides that "no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." This section, too, is inapplicable to the present case. The argument of the petitioner, based upon it, finds a complete answer in the findings of fact of the District Court. That court found in substance that the petitioner itself as a "person" had committed the unlawful acts upon which this injunction is based. This finding was approved and affirmed by the United States Circuit Court of Appeals. Thus any authorization or ratification by the petitioner is not a necessary prerequisite to the granting of an injunction.

The third provision of the statute cited by the petitioner is a portion of Section 9, and reads as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein."

The petitioner contends that this language prevents a court from granting any *mandatory* injunction in a case involving a labor dispute. This obviously is a strained interpretation of the statute. The obvious intent was to limit the *prohibition* of injunctive orders to specific acts rather than to limit the granting of *injunctions* to those merely *prohibitive* in nature.

We have considered individually above each section of the Anti-Injunction Act invoked by the petitioner. Fundamentally, however, the act as a whole cannot be applicable to this type of case. This is shown by the circumstances under which the act was passed, and the conditions which it was designed to remedy. Its enactment grew out of a controversy as to the social desirability of an increased resort to federal courts by employers seeking injunctions in cases of widespread strikes or lockouts. It was designed to restore the balance of economic power of the contending parties which was thought to have been disturbed in favor of the employers by the frequent granting of such injunctions. This is revealed in Section 2 of the act which states the policy of the United States applicable to its interpretation and

application.[1] It is to be noted that Section 1 of this act provides further that no "restraining order or temporary or permanent injunction" shall "be issued contrary to the public policy declared in this act."

By arguing that the Norris-LaGuardia Act should be interpreted as limiting the power of the courts to grant an injunction in this case, the petitioner is attributing to Congress a legislative intent which is wholly incongruous. The Virginian Railway, by concurring judgments of the lower courts, stands convicted of the commision of acts of "interference" with, "restraint or coercion" of its employees "in the designation of * * * representatives or in self-organization," acts which are not only contrary to the Railway Labor Act, but which are expressly condemned in the Norris-LaGuardia Act itself.

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[1] "In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, c. 90, Art. 2, 47 Stat.)"

It is unthinkable that Congress should have intended that the provisions of the Norris-LaGuardia Act be applied in such manner as to give protection to the perpetrators of the very practices which the act sought to outlaw and eliminate.

Furthermore, in order that a party may secure the immunity from injunction provided by the Anti-Injunction Act, it must appear that the party in question is a participant in a labor dispute. The petitioner, prior to its petition to this court, has insisted, first, that no dispute exists (R. 45, 46, 48), and second, that if a dispute does exist, it is not a party to it (R. 287, Assignment of Error No. 20). However this may be, the petitioner, by making the present contention has presented itself squarely to this court as being a party to a dispute with the majority of its employees contesting their right to freedom of choice of representatives. The fact that this contention is made here, whether correctly or incorrectly, should be kept in mind by the court in passing upon the general equities of the case.

Furthermore, the Norris-LaGuardia Act was never intended to apply to a situation of this sort. It was designed to deal with situations growing out of strikes or threats of strikes. As stated by the United States Circuit Court of Appeals for the 7th Circuit, in *United Electric Coal Companies vs. Rice,* 80 Fed. 2d 1, (*certiorari* denied March 2, 1936,) at page 5:

> "Confirmation of this conclusion may be found in the other sections of the act which clearly indicate that the entire act had reference to controversies over wages and conditions of employment which arise between employer and employee and

> result in strikes or threatened strikes which work hardships upon the innocent third party—the public."

Finally, even though the Anti-Injunction Act were applicable to this case, it must be remembered that it was passed in 1932, and the Railway Labor Act was passed in 1934. As we have seen, Congress intended by the latter statute to impose enforceable legal obligations. No means of enforcement has been suggested save that provided by an injunction. If the Railway Labor Act thus imposed legal obligations for the enforcement of which an injunction is the only practicable method, then to this extent it must be held to take precedence over the provisions of the earlier statute.

The case most nearly parallel to this situation is one decided by the United States Circuit Court of Appeals for the 7th Circuit, *International Alliance vs. Rex Theatre Co.*, 73 Fed. 2d, 92, where the court was confronted with this exact contention in regard to the National Industrial Recovery Act. The court said, on page 93:

> "It is quite true that section 703 (c), *supra* provides for the enforcement of the code by injunction, and if that section is in any way inconsistent with the provisions of 29 U. S. C. A. Art. 104 (3) the former will prevail as it is a later enactment." (p. 93).

Thus none of the specific sections of the Anti-Injunction Act resorted to by the petitioner can be construed as giving it the immunity from injunction which it seeks, and the act as a whole is inapplicable to this case. Its stated policy, the situation which gave rise to its enactment, and the language of its several provisions all in-

dicate that it was designed to fit an entirelly different sort of situation, that is, one involving strikes, threatened strikes, or lockouts. Finally, if it was ever applicable to such a controversy as that before this court, its provisions have been superseded by those of the Railway Labor Act which created special rights and by necessary implication a remedy by injunction to enforce them.

CONCLUSION

From and even prior to the inception of our federal government, it has been recognized that the free and uninterrupted flow of commerce among the several states is a matter of the utmost concern to the entire nation. Probably no single factor contributed more materially to the adoption of the Constitution than the realization that commerce was endangered by impediments, actual or threatened, which the individual states and their citizens were even then erecting. The power to regulate interstate commerce and the agencies by which it is carried on is inherent in our scheme of government. With the increased size and complexity of the commercial mechanism has come inevitably an increase in the number and complexity of the factors which threaten its effective operation. One by one these factors have been dealt with by federal authority as they have arisen. Problems of rates, discriminatory practices, standards of equipment, financial structure, and the like have been considered and passed upon. The human element, too, has been given appropriate attention. The personal safety of employees and their hours of service have formed the subject matter of federal statutes. The public interest with which

the commercial process is impressed and the express grant of regulatory power contained in the Constitution itself have been the foundation for a long succession of legislative and judicial precedents supporting the federal authority to meet novel problems connected with interstate commerce by appropriate remedies, and to sweep from the path of commerce those obstructions, tangible or intangible, which bar its progress or cripple it as an instrumentality of public service. This long procession of statutes and judicial decisions constitutes the legal ancestry of the act now under consideration. The Railway Labor Act recognizes facts as they exist and as they affect or are likely to affect the commercial structure. It is based on the proven hypothesis that men are as essential to the functioning of a carrier as machines or money. When men cease to work, machines and money are powerless to carry on. A grievance or an unadjusted labor dispute is as much a defect in the operating equipment of a railroad as a flaw in a locomotive or a weakness in its financial or accouting structure. Rates are no less a matter of concern to the public than the labor costs which are an important factor in determining them. Discrimination is as prejudicial to effective public service when practiced among employees as when practiced among shippers.

Recognizing all this, the Congress has sought to stabilize relations between carriers and their emeployees on a peaceful and mutually satisfactory basis. It has stated the principles and has provided the technique to accomplish that end, all to the intent that another menace to the continuity and efficiency of interstate commerce may be eliminated. The whole constitutional history of

our government supports this act as a legitimate exercise of federal power in a field of regulation well recognized and understood.

The ancestry of the act, the evil which it seeks to remedy, and the field in which it operates all indicate that it should be interpreted with a liberality in proportion to its nature and in such manner that the paramount public policy which it seeks may be completely attained.

Without more, therefore, the respondents rest their case with this court on the following propositions:

1. The Railway Labor Act (Section 2, Ninth) imposes an enforceable obligation upon carriers to "treat" with the representatives of employees certified as such by governmental authority, which is exemplified in this instance by the National Mediation Board.

2. So interpreted, it takes from the petitioner no contract right so essential or valuable as to weigh against the fundamental purpose of the statute. Hence the act is not an unreasonable or arbitrary abuse of power within the meaning of the 5th Amendment to the Constitution.

3. Considering the effect of labor disputes among all employees of carriers, and in particular among back shop employees, an act seeking to eliminate such disputes is within the commerce power granted to the Congress by the Constitution.

4. The certification of the National Mediation Board is valid,

(a) in that it properly construed the statute and determined that the choice of employees as to representatives should be determined by a majority of those who were sufficiently interested or courageous to express their opinions in an election held for that purpose; and

(b) in that it stated all the facts and conclusions of fact essential to establish its validity.

5. The power of the courts to act in this case is not limited by the provisions of the Norris-LaGuardia Act, because the petitioner has not brought itself within the provisions of the act invoked by it, because the spirit and purpose of the act indicate that it was not intended to be applied to such a situation, and because in any event the Railway Labor Act, being a subsequently enacted statute, takes precedence over it.

Respectfully submitted,

FRANK L. MULHOLLAND,
CLARENCE M. MULHOLLAND,
WILLARD H. MCEWEN,
S. M. BRANDT,
Attorneys for Respondents.

APPENDIX I

Sections of the Railway Labor Act. (Public Act No. 442 of the 73rd Congress. — C. 691, 48 Stat. —, U. S. C., Title 45, Ch. 8, approved June 21, 1934.)

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"SECTION 1. When used in this Act and for the purposes of this Act—

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized

by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

SEC. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such

agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way intefere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its

employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of

a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the

requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction

thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

SEC. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within

thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known

as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the em-

ployee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the

time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

SEC. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the

1st day of April, 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

SEC. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as re-

quired by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

SEC. 8. It any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

Approved, June 21, 1934.

APPENDIX II

Sections of Norris-LaGuardia Act

Sec. 1. No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (Mar. 23, 1932, C. 90, Art. 1, 47 Stat. U. S. C. Title 29, Sec. 101.)

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organiza-

tion or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, C. 90, Art. 2, 47 Stat. U. S. C. Title 29, Sec. 102.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof. (Mar. 23, 1932, C. 90, Art. 6, 47 Stat. U. S. C. Title 29, Sec. 106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or

actually authorizing or ratifying the same after actual knowledge thereof:

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. * * * (Mar. 23, 1932, C. 90, Art. 7, 47 Stat. U. S. C. Title 29, Sec. 107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order of injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (Mar. 23, 1932, C. 90, Art. 9, 47 Stat. U. S. C. Title 29, Sec. 109.)